Supreme Court, U.S.
FILED

92-190
No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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QUESTION PRESENTED

The McCarran Amendment allows joinder of the United States as a defendant in general stream adjudications, but specifically provides that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The question presented is whether, when a State joins the United States as a defendant in such a suit, the State may refuse to recognize the United States' water rights claims unless the United States pays "filing fees" to finance the State's costs in the adjudication.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Idaho Power Company, Twin Falls Canal Company, and North Side Canal Company participated as respondents in the Idaho Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINIONS BELOW

The decision of the Idaho Supreme Court (App., *infra*, 1a-40a) is not yet reported. The judgment of the district court (App., *infra*, 41a-44a) and the memorandum decisions of the district court (App., *infra*, 45a-80a, 81a-89a, 90a-115a) are unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on March 30, 1992. On June 22, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The McCarran Amendment provides in relevant part:

> § 666. Suits for adjudication of water rights
>
> (a) Joinder of United States as defendant; costs
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

Section 42-1414 of the Idaho Code provides in relevant part:

> § 42-1414. Fees for filing notice of claim.—In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim * * * unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. * * *
>
> (1) Flat fee per claim filed:
>
> (a) Claims for domestic and or stockwatering rights $25.00
>
> (b) Claims for all other rights $50.00
>
> (2) Additional variable water use fee for claims filed based upon acreage, power generating capacity, c.f.s., or equivalent volume of water:
>
> (a) Irrigation use (one fee irrespective of number of claims): ..... $1.00 per acre
>
> (b) Power: .... $3.50 per kilowat of capacity (manufacturer's nameplate rating)
>
> (c) Aquaculture: ..... $10.00 per c.f.s.
>
> (d) Municipal, industrial, commercial, mining, heating, cooling: .. $100.00 per c.f.s.
>
> (e) Public instream flow, public lake level maintenance, wildlife: $100.00 per c.f.s.
>
> (3) * * * All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established in section 42-1777, Idaho Code.

Idaho Code § 42-1414 (1990).

STATEMENT

The McCarran Amendment allows a State to join the United States as a defendant in a suit for the adjudication of rights to the use of water of a river system or other source, but bars entry of any "judgment for costs" against the United States in such a

suit. 43 U.S.C. 666(a). Notwithstanding the McCarran Amendment's limited waiver of sovereign immunity and its specific prohibition on any "judgment for costs," the State of Idaho has revised its general stream adjudication procedures to require the United States to make extraordinary, multi-million dollar payments to finance the State's adjudication expenses.

Under Idaho's new procedures, participants in the adjudication, including the United States, must pay "filing fees" at the time they submit their notices of claims to water rights. Those variable fees are highest for the types of water rights claims frequently asserted by the United States and the Indian Tribes. When Idaho named the United States as a defendant in a general stream adjudication of the Snake River, the United States objected to the fee requirement—which would require the United States to pay Idaho an estimated $10 million in this case alone—arguing that the McCarran Amendment does not waive the United States' sovereign immunity from imposition of such fees. The Idaho District Court rejected the United States' argument, and a sharply divided Supreme Court of Idaho affirmed that decision.

1. Congress enacted the McCarran Amendment to facilitate the comprehensive determination of water rights through general stream adjudications in state courts. Enacted in 1952, the McCarran Amendment contains three principal provisions respecting the United States' waiver of sovereign immunity. First, the Amendment provides that the United States may be joined as a defendant in any suit

> (1) for the adjudication of rights to the use of water of a river system or other source, or
>
> (2) for the administration of such rights,

where it appears that the United States

> is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. 666(a). Second, it limits the United States' use of sovereign immunity as a defense on the merits, stating that when the United States has been properly joined in the above circumstances, the United States shall

> be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

43 U.S.C. 666(a). Third, the McCarran Amendment states that the United States shall be "subject to the judgments, orders, and decrees of the court having jurisdiction," *provided*

> That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

At the time Congress enacted the McCarran Amendment, Idaho used judgments for costs to finance the State's expenses in general stream adjudication suits. See Idaho Code § 42-1401 (1948) (Idaho Exh. 247). Idaho's Department of Reclamation would make an examination of the stream and submit an itemized, verified statement of its expenses to the state auditor, who would present the statement to the state board of examiners. Expenses approved by the board would be paid out of general revenues. The state auditor would then certify those amounts to the court for inclusion as "part of the

costs and disbursements in said cause." Idaho Code § 42-1401 (1948). At the time of entry of final judgment, the court would

> adjudge and determine the proportionate amount of such cost of examination and survey to be paid by each of the parties to said suit * * *.

Idaho Code § 42-1401 (1948). The McCarran Amendment's "costs proviso" retained the United States' immunity from assessment under that financing mechanism.[1]

2. For many years, the State of Idaho and the Idaho Power Company have been engaged in a dispute over the utilization of water from the Snake River. See *Idaho Power Co.* v. *State*, 661 P.2d 741 (Idaho 1983). To resolve that longstanding dispute, the State of Idaho and the Idaho Power Company agreed to propose and support legislation authorizing a general adjudication of water rights in the Snake River basin. In 1985 and 1986, the Idaho Legislature enacted the proposed legislation, which provides that "the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran Amend-

[1] The McCarran Amendment had the same effect in other western States, including Senator McCarran's own State of Nevada, which also used judgments for costs to recoup the State's expenses in conducting general stream adjudications. See 1943 Cal. Stat. 1631-1632 (Cal. Water Code §§ 2040-2043) (Idaho Exh. 245); Nev. Comp. Laws § 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); N.M. Stat. § 77-406 (1941) (Idaho Exhs. 257-258); N.D. Rev. Code § 61-0317 (1943) (Idaho Exh. 259); Okla. Stat. § 82-13 (West 1951) (Idaho Exh. 260); Or. Comp. Laws Ann. § 116-822 (1940) (Idaho 261-262); Utah Code Ann. § 100-4-20 (1943) (Idaho Exh. 265a-b); Wash. Rev. Stat. § 7371 (Remington 1932) (Idaho Exhs. 266-267).

ment." Idaho Code § 42-1406A(1) (1990). See generally *In re Snake River Basin Water System*, 764 P.2d 78, 81 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989).

The state legislation revised Idaho's methods for financing its costs in water right adjudications. Specifically, the legislation states that the Director of Idaho's Department of Water Resources shall not accept a "notice of claim" from any water right claimant unless the notice is accompanied by a filing fee in accordance with a fee schedule set out in the statute. Idaho Code § 42-1414 (1990). "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." Idaho Code § 42-1414 (1990).[2]

The monies collected as filing fees are "placed in the water resources adjudication account established in section 42-1777." Idaho Code § 42-1414(3) (1990). The Idaho Legislature annually appropriates the filing fees placed in that account "to pay the costs of the [Department of Water Resources] attributable to general water rights adjudications" and "to pay for judicial expenses directly related to the Snake River adjudication." Idaho Code § 42-1777(1) and (2) (1990). Idaho uses the funds placed in the adjudication account to pay not only the State's costs of processing, filing, and reporting on water rights claims, see, *e.g.*, R. 414-415, 421-423, but also various litigation costs that the State incurs in challenging such claims, including attorney salaries and expenses for investigations, evidentiary development, witnesses,

[2] Idaho first imposed filing fees in 1971, but the fees that Idaho imposed between 1971 and 1985 were nominal in amount. See Idaho Code § 42-221 (1977).

and service of process. See, *e.g.*, U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 547-553, 595.

Although the Idaho statute describes the fee structure as providing an "equitable cost-sharing formula for financing the costs of adjudicating water rights," Idaho Code § 42-1414 (1990), the variable filing fees fall more heavily upon sovereign claimants, such as the United States and Indian Tribes, that are entitled to file notices of claims to instream flows.[3] The United States has estimated that the Idaho statute would require that federal agencies pay more than $10 million in fees in the Snake River Basin Adjudication, and the bulk of those fees would be required for federal reserved water right claims, as distinguished from claims to water acquired under state law. See, *e.g.*, R. 246-262, 265-266, 271-287.

3. On June 17, 1987, the Director of the Idaho Department of Water Resources filed a petition in the District Court of the Fifth Judicial District naming the United States and all other water users of the Snake River basin as defendants. The district court formally commenced the adjudication by order dated November 19, 1987, see *In re Snake River Basin Water System*, *supra* (affirming the commencement order), and the Director has begun the process of receiving notices of water rights claims in accordance with

[3] Agricultural users pay the lowest variable fee—one dollar per acre irrigated, regardless of the amount of water diverted or consumed. Hydropower users are assessed a comparatively low fee of $3.50 per kilowatt of capacity, while entities claiming water for aquaculture are charged $10 per cfs (cubic foot per second). Entities claiming water for municipal, industrial, or commercial use and public entities seeking to maintain minimum instream flows are charged $100 per cfs. See Idaho Code § 42-1414 (1990).

Idaho law. See Idaho Code § 42-1408A to 42-1410 (1990). The district court established a schedule under which the United States' claims are filed on an agency-by-agency basis.

The United States has attempted to submit its notices of claims according to the court's schedule, but the Director has refused to file any notices not accompanied by filing fees. See Tr. 1180. On June 30, 1989, the United States filed a petition for a writ of mandamus to compel the Director to accept the United States' notices without filing fees. The petition asserted, *inter alia*, that the Director was under a duty to file the notices without accompanying filing fees because the McCarran Amendment does not waive the United States' immunity from assessment of fees in general stream adjudications. The district court entered a judgment denying the petition for a writ of mandamus after issuing a series of memorandum decisions rejecting the United States' specific contentions. App., *infra*, 41a-44a, 45a-80a, 81a-89a, 90a-115a.

The district court's second decision specifically rejected the United States' argument that the McCarran Amendment does not waive federal sovereign immunity from payment of the State's filing fees. The court stated that "[t]he ordinary, contemporary and common meaning of the language of *McCarran* is that Congress waived *all rights* to assert any facet of sovereign immunity in a general [stream] adjudication * * * which is being conducted in accordance with state law." App., *infra*, 86a (emphasis in original). The court concluded that the McCarran Amendment's "costs proviso" supported its result, reasoning that the Amendment "specifically exempts the United States from paying any 'judgment for costs,'" but contains "[n]o exception for filing fees." *Id.* at 88a.

4. The Idaho Supreme Court affirmed in a sharply divided decision. App., *infra*, 1a-40a. The three-judge majority concluded that the McCarran Amendment contains a clear and unambiguous waiver of federal sovereign immunity from filing fees, stating that the "language selection" in the amendment "clearly subjects the United States to all laws concerning an 'adjudication.'" *Id.* at 12a. The majority rejected constructions of the Amendment other than its own, stating that "[t]he employment of alternative statutory construction techniques is not required in analyzing 43 U.S.C. § 666(a) unless it is for the purpose of attempting to strain the plain statutory language to reach some pre-ordained result." *Ibid.*

The majority found no merit in the United States' suggestion that the McCarran Amendment's costs proviso demonstrated Congress's intent that the United States would not be subject to state filing fees. The court concluded that the McCarran Amendment protects the United States only from a judgment for costs and that "[f]ees do not come within the term costs" because "costs are the charges that a party may recover from the opponent" while "fees are those amounts paid to the court." App., *infra*, 14a. Justice Bistline wrote a separate concurring opinion in which he largely rejected the doctrine of federal sovereign immunity, but also stated that he was "not persuaded of any error in [the majority's] analysis." *Id.* at 26a.

Justices Johnson and Boyle wrote separate dissents. The two dissenters concluded that the McCarran Amendment does not waive the United States' immunity from payment of filing fees. See App., *infra*, 28a-29a, 29a-40a. Justice Johnson rejected the majority's distinction between filing fees and costs, observing that "[t]he 'filing fees' the state seeks to

charge the United States are not the usual modest fees for filing pleadings in a lawsuit." *Id.* at 28a. Rather, the United States was being required "to fund involuntarily a significant part of the cost of the SRBA [Snake River Basin Adjudication]" when the adjudication itself was "occasioned" by the settlement of a dispute between the State and Idaho Power Company and "[t]he United States is just along for the ride, pursuant to the McCarran Amendment." *Ibid.* Justice Johnson concluded:

> By the McCarran Amendment, the United States consented to joinder as a defendant in a "general adjudication." * * * The plain reading of the McCarran Amendment indicates that the United States did not waive its sovereign immunity to the payment of costs. * * * These "filing fees" are nothing more nor less than the State's costs for conducting the SRBA. By the McCarran Amendment, the United States waived its sovereign immunity only so far as being joined as a defendant, not so far as involuntarily paying the costs of the litigation.

Id. at 29a.

The other dissenter, Justice Boyle, objected that the majority's decision was inconsistent with "the Supreme Court's recent pronouncements" concerning waivers of sovereign immunity. App., *infra*, 30a. He explained that a waiver of sovereign immunity "must be grounded exclusively upon the statutory text" and must be "unequivocal." *Ibid.*, citing *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992). Because it is "at least 'plausible'" to construe the McCarran Amendment as retaining the United States' immunity from state filing fees, App., *infra*, 38a, Judge Boyle concluded that the Amendment does not

provide an "unequivocal statutory waiver," *id.* at 40a.[4]

REASONS FOR GRANTING THE PETITION

The McCarran Amendment contains a carefully limited waiver of the United States' sovereign immunity. The statute disclaims federal immunity in three respects: it allows a State to join the United States as a defendant in a general stream adjudication suit; it restricts the United States' power to assert sovereign immunity to avoid state laws governing the appropriation of water; and it subjects the United States to the resulting state court judgments, subject to the proviso that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The Idaho Supreme Court has misinterpreted the McCarran Amendment in a way that is flatly inconsistent with this Court's precedents; greatly enlarges the scope of the waiver in a statute of broad applicability in numerous state courts; and allows States to circumvent the "costs proviso." The decision raises an important and recurring issue of federal-state relations that should be resolved in this case.

1. The Idaho Supreme Court's decision resolves the scope the United States' sovereign immunity through an analytical approach inconsistent with numerous rulings of this Court. As the Court has repeatedly stated, a waiver of the United States' sovereign immunity must be unequivocally expressed; waiver may not be implied, assumed, or based on speculation or ambiguity. *United States Dep't of Energy* v. *Ohio*,

[4] After the state supreme court's decision, the district court issued an order requiring the Director to accept the United States' claims without payment of fees, pending final resolution of the controversy.

112 S. Ct. 1627, 1633 (1992); *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *King*, 395 U.S. 1, 4 (1969). And any waiver of the United States' immunity to suit must be construed "strictly in favor of the sovereign" and "not 'enlarged beyond what the language requires.'" *Nordic Village, Inc.*, 112 S. Ct. at 1015; *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986); accord *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).[5]

Moreover, the Court has consistently ruled that a waiver of federal sovereign immunity does not subject the United States to *monetary* liability unless that result is specifically and clearly intended. For example, in *Ohio*, the Court concluded that a provision of the Resource Conservation and Recovery Act (RCRA) that subjects the United States to "all Federal, State, interstate, and local requirements, both substantive and procedural, * * * in the same manner, and to the same extent, as any person is subject to such requirements," 42 U.S.C. 6961, is not "an explicit and unambiguous waiver of federal sovereign immunity from punitive fines." *Ohio*, 112 S. Ct. at 1639. The Court explained:

> We * * * agree with the Tenth Circuit that "all . . . requirements" "can reasonably be interpreted

[5] The Court has stated that asserted waivers of sovereign immunity must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. 200, 211 (1976); see also *Mayo* v. *United States*, 319 U.S. 441, 445-447 (1943). "Particular deference should be accorded" to that rule when "the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign." *Train*, 426 U.S. at 179.

as including substantive standards and the means for implementing those standards, but excluding punitive measures." *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (CA10 1990).

Id. at 1639-1640. Similarly, in *Nordic Village*, the Court rejected a claim that Congress had waived federal immunity from monetary liability in Section 106(c) of the Bankruptcy Code. The Court found that Section 106(c) could be "plausibl[y]" construed not to reach monetary liability, which "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Village*, 112 S. Ct. at 1016.[6]

The Idaho Supreme Court's determination that "the McCarran Amendment waives sovereign immunity and subjects the United States to the laws of Idaho in the Snake River Basin Adjudication including the payment of filing fees," App., *infra*, 20a, can be reconciled with neither this Court's rulings nor the language of the McCarran Amendment. When the McCarran Amendment was enacted, the United States generally was immune from any method of cost-shifting in litigation, whether by a judgment for costs or by otherwise requiring litigants to pay ex-

[6] See also, *e.g.*, *Library of Congress*, 478 U.S. at 318-321 (federal statute subjecting United States to "costs the same as a private person" including "a reasonable attorney's fee as part of the costs" did not subject United States to payment of interest on attorneys' fees); *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563 (1921) (federal statute subjecting carriers under federal control to "all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," did not subject federal carrier to penalties authorized by state statute).

penses, attorney's fees, or interest.[7] The McCarran Amendment, which does not even waive the United States' immunity to monetary claims on the merits, does not waive that longstanding immunity to monetary assessments. In particular, it contains no language authorizing the States to impose fees against the United States for "financing the costs [to the State] of adjudicating water rights." Idaho Code § 42-1414 (1990). Indeed, the McCarran Amendment's costs proviso makes clear Congress's intent that the United States would *not* be subject to state cost-shifting arrangements.

The Idaho Supreme Court made several distinct errors in nonetheless concluding that the McCarran Amendment waives federal sovereign immunity from assessment of the State's fees in litigation. First, the majority mistakenly determined that a clear and unambiguous waiver could be found in the Amendment's first sentence, which allows a State "to join the United States as a defendant in any suit" for the general adjudication of water rights. 43 U.S.C. 666(a). The Idaho court construed that language as a federal waiver of immunity to all state laws "necessary to carry out these types of suits." App., *infra*, 11a. Filing fee assessments are in no sense "necessary" to carry out a water rights adjudication. But more importantly, Congress's consent to joinder of

[7] See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926) (recognizing the United States' "sovereign prerogative not to pay costs"); accord *The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827). See also, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. at 314-317 (describing the United States' traditional immunity from interest assessments); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) ("Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees.").

the United States as a defendant cannot plausibly be read as consent to assessment of the unconventional filing fees Idaho has only recently begun to impose. Under traditional practice, it is the plaintiff initiating the action—rather than the defendant—who pays a nominal filing fee for invoking the jurisdiction of the court.[a] There is no reason to believe that Congress intended that joinder of the United States as a defendant in a water rights adjudication would enable States to make extraordinary multi-million dollar fee assessments against the federal treasury.[b]

The Idaho Supreme Court also erred in concluding that a clear waiver could be found in the first part of the McCarran Amendment's second sentence, which states that when the United States is properly joined, it shall "be deemed to have waived any right to plead that *the* State laws are inapplicable." 43 U.S.C. 666(a) (emphasis added). The Idaho court construed that phrase as a federal waiver of immunity to application of all state laws. App., *infra*, 11a-12a. Congress's placement of the definite article "the" before "State laws" indicates, however, that the waiver is limited to "the State laws" that Congress identified in the previous sentence: the state laws governing "acqui[sition of] water rights by appropriation." 43

[a] See, *e.g.*, 28 U.S.C. 1914 (requiring "the parties instituting any civil action * * * to pay a filing fee of $120"); see also 28 U.S.C. 1914 (1952) (requiring "the parties instituting any civil action * * * to pay a filing fee of $15).

[b] Significantly, when the United States is a plaintiff in the federal courts, it does not pay filing fees. See 28 U.S.C. 1913 note (United States not subject to filing fees in courts of appeals); 28 U.S.C. 1914 note (United States not subject to filing fees in district courts); 28 U.S.C. 1930 note (United States not subject to filing fees in bankruptcy proceedings).

U.S.C. 666(a). The provision makes clear that the United States cannot plead soveriegn immunity to excuse its failure to follow state law requirements in *acquiring water rights*, where the water rights are derived from state law rather than a federal reservation. In other words, the quoted phrase spells out the scope of the waiver of immunity insofar as the merits of the suit are concerned. It does not prevent the United States from asserting immunity from other "State laws," including statutes assessing attorney's fees and costs, for which a "separate waiver" is required. Cf. *Library of Congress* v. *Shaw*, 478 U.S. at 314. The Idaho court impermissibly enlarged the waiver, by implication, "beyond what the language requires." *Id.* at 318. See App., *infra*, 38a (Boyle, J., dissenting).

Finally, the Idaho Supreme Court misconstrued the second part of the second sentence of the McCarran Amendment, which states that the United States shall be subject to the "judgments, orders, and decrees of the court having jurisdiction" to the same extent as a private party, except that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The Idaho court concluded that this proviso does not prevent the State from imposing filing fees, because fees "are distinguishable from costs." App., *infra*, 14a. Although Idaho's filing fees differ from a judgment for costs in the *manner* by which the State exacts money from the federal treasury, those fees have the same purpose and effect of forcing the United States to fund the State's litigation costs, including fees to pay the State's attorneys and related expenses in connection with the suit. It makes no sense to conclude that Congress prohibited the States from subjecting the United States to a "judgment for costs," but none-

theless authorized the States to impose filing fees that serve the same purpose of "financing the *costs* of adjudicating water rights." Idaho Code § 42-1414 (1990) (emphasis added). Congress adopted the proviso to protect the United States from monetary liability—not to preclude a particular method of assessment.

In short, Idaho's assessment of filing fees against the United States cannot be reconciled with this Court's sovereign immunity decisions. Idaho's attempt to shift the costs of adjudication to the United States is impermissible because the McCarran Amendment does not allow it. As the Court recognized in *Library of Congress* v. *Shaw*, sovereign immunity may not be avoided "by devising a new name for an old institution." 478 U.S. at 321. That is exactly what Idaho seeks to do through its use of filing fees. Idaho has attempted to circumvent the McCarran Amendment's cost proviso by assessing costs at the beginning, rather than at the end, of the litigation.[10]

[10] The Idaho Supreme Court's statement that, prior to the McCarran Amendment, "at least six [States] did charge a fee for filing a notice of claim," App., *infra*, 13a, is inaccurate. Arizona, Nevada, and Oregon required payment of filing fees in administrative water rights proceedings, but they did not require payment of filing fees in judicial water rights proceedings. See Ariz. Code §§ 75-114, 75-137 (1939) (Idaho Exh. 243); Nev. Comp. Laws §§ 7905, 7914, 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); Or. Comp. Laws Ann. §§ 116-807, 116-822 (1940) (Idaho Exhs. 261-262). The difference is important because the McCarran Amendment waiver extends only to judicial water rights proceedings. See 43 U.S.C. 666(a) (allowing joinder of the United States "as a defendant in any suit" for the general adjudication of water rights). In the case of California, Colorado, and Washington, each of those States charged a nominal flat fee for filing a notice of claim. See 1943 Cal. Stat. 1641 (Cal. Water Code § 2850) ($5 per claim) (Idaho Exh. 245); Colo. Rev. Stat. § 147-9-19(4) (1953) ($5 per claim) (Idaho Exh. 246); Wash. Rev. Stat. § 7371 (Remington 1932) ($1 per claim). They did not charge anything like the extraordinary variable fees that Idaho seeks to assess in this case.

2. This case merits the Court's review, as the state court's decision presents a direct clash between the United States and an individual State concerning the scope of the federal government's sovereign immunity in state courts. The state supreme court has seriously misinterpreted Congress's intent in subjecting the United States to joinder as a defendant in state-initiated general stream adjudications, erroneously holding that a State may charge the United States monetary fees for the prerogative of defending its rights in state court. That question, which involves the intergovernmental relationship of the federal and state sovereigns, is a matter especially within this Court's province to decide. See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); cf. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

The issue is important not only as a matter of federal-state relations. It also has a direct impact on the administration of federal programs. The fees at issue are not nominal. In this adjudication alone, federal agencies must either pay fees assessments estimated to exceed $10 million or else forfeit their water rights. The Idaho court's decision will force federal agencies to redirect their limited funds to pay the State's costs in a state-initiated adjudication. As both dissenting Justices below recognized, that result conflicts with Congress's intent, expressed in the McCarran Amendment's costs proviso, that the United States not be subject to assessments for the

costs of adjudication. See App., *infra*, 28a-29a (Johnson, J., dissenting); *id.* at 39a (Boyle, J., dissenting).

The decision is additionally important because it subjects the United States to "potential fee exposure by all the states subject to the McCarran Amendment." App., *infra*, 40a (Boyle, J. dissenting). If the Court does not grant the petition for a writ of certiorari, other western States are likely to follow Idaho's course and enact legislation creating similar fee regimes that draw upon the federal fisc to finance state-initiated general stream adjudications.[11] The validity of Idaho's approach should be decided now, before other States expend time and energy to enact similar legislation and before the United States is forced to expend its limited litigation resources on challenges to such legislation in numerous state courts.

[11] The United States District Court for the District of Oregon subsequently followed the Idaho district court's decision in a case involving Oregon's imposition of filing fees in that State's administrative determination of water rights. *United States* v. *Oregon Water Resources Dep't*, 774 F. Supp. 1568, 1580-1581 (D. Or. 1991). The federal district court recently denied the United States' motion for reconsideration of that interlocutory ruling. See Order, No. 90-1329-FR (D. Or. July 10, 1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1992

APPENDIX A

1992 OPINION NO. 54

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOISE, JANUARY 1992 TERM

S. Ct. No. 19407

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

STATE OF IDAHO, ex rel. R. KEITH HIGGINSON, in his official capacity as Director of the Idaho Department of Water Resources,
PLAINTIFF-RESPONDENT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

and

IDAHO POWER COMPANY,
TWIN FALLS CANAL COMPANY,
NORTH SIDE CANAL COMPANY,
DEFENDANTS-RESPONDENTS

Filed: March 30, 1992

FREDERICK C. LYON, Clerk

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls. The Honorable Daniel C. Hurlbutt, Jr., District Judge.

Appeal from the denial of a petition for writ of mandamus. *Affirmed.*

McDEVITT, J.

This cases arises out of the Snake River Basin Adjudication. The United States filed a Petition for a Writ of Mandamus, requesting the district court to issue an order requiring the director of the Idaho Department of Water Resources (the agency in charge of receiving notice of claims to water rights in the adjudication) to accept the filing of the United States' Notices of Claims to a Water Right without payment of the required filing fees. The district court denied the petition. We affirm.

The Snake River Basin Adjudication ("SRBA") is being conducted pursuant to I.C. § 42-1406A. On June 30, 1989, the United States of America filed a petition for a Writ of Mandamus, or alternatively, declaratory or injunctive relief. The United States sought an order from the district court requiring the director of the Idaho Department of Water Resources ("the director") to accept the filing of its claims without payment of the filing fees as required by I.C. § 42-1414. The United States contends that the McCarran Amendment, 43 U.S.C. § 666, does not waive sovereign immunity from the payment of filing fees.

Subsequent to the filing of the petition, on July 6, 1989, the United States submitted its Notices of Claim to a Water Right on behalf of the Bureau of Reclamation and the Department of the Interior without payment of the filing fees to the director. The

director refused to file the notices of claims. On July 10, 1989, the district court entered an order requiring the director to accept the notices for lodging, but not for filing.

The district court required the United States to submit a list of issues to be litigated concerning the issue of filing fees. Several motions for summary judgment were filed by the parties. The trial court issued two separate memorandum opinions. The first was filed December 27, 1990. The district court also granted the State's Motion for Summary Judgment as to several issues and then limited the issues to be considered at trial. The remaining issues were tried to the district court without a jury, after which, the district court denied the United States' petition for a Writ of Mandamus. From this denial the United States appeals.

ISSUE ON APPEAL

DOES THE McCARRAN AMENDMENT, 43 U.S.C. § 666, ALLOW THE STATE OF IDAHO TO COLLECT FILING FEES FROM THE UNITED STATES FOR CLAIMS FILED IN THE SNAKE RIVER BASIN ADJUDICATION?

A little background on the SRBA and on general water adjudications in the State of Idaho is helpful in understanding the dispute between the parties. In 1985, the Idaho Legislature passed I.C. § 42-1406A.[1]

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[1] Idaho Code § 42-1406A provides in part:

Snake River Basin Adjudication—Commencement.—(1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district

court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated:

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to section 42-1408 through 42-1414, Idaho Code; and,

(d) Defines any uses of water excluded from the adjudication proceedings; the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the state of Idaho upstream from

This statute required the director to file a petition in district court to commence an adjudication of the water of the Snake River Basin. The director filed a petition seeking a court order commencing the adjudication in the district court on June 17, 1987. In this petition, the director named the United States and all other water users as defendants. The district court entered an order on October 14, 1987, commencing the Snake River Basin Adjudication. This Court then affirmed the district court's order commencing the adjudication. *In re Snake River Basin Water Sys.*, 115 Idaho 1, 764 P.2d 78 (1988), *cert. denied, Boise-Kuna Irri. Dist. v. United States*, 490 U.S. 1005, 109 S.Ct. 1639 (1989).

Once the district court entered the order commencing the adjudication, Idaho statutes provide the procedure to be followed in the adjudication. Idaho Code § 42-1406A(2) required the director to perform an investigation to determine the various water rights among the water users of the Snake River Basin. Idaho Code §§ 42-1408 and 42-1408A instruct the director to prepare a notice and to serve notice upon all claimants. Claimants are then required by I.C. § 42-1409 to file Notices of Claim to a Water Right with the director. Idaho Code § 42-1414 sets the filing fees to be paid at the time of filing the Notice of Claim to a Water Right. The director then must investigate each separate claim. After investigating all claims, I.C. § 42-1411 requires the director to prepare a report determining what rights have been acquired under state law and then to file this report with the district court. Idaho Code § 42-1412 allows any claimant to object to any portion of the director's re-

the point at which the Snake River leaves the state of Idaho and enters the state of Oregon in section 14, township 4 north, range 6 west, Boise Meridian . . .

port. The district court then proceeds to trial on any contested matters. *Id.* Those portions of the director's report that receive no objection are admitted as true. I.C. § 42-1412(9). The district court then enters the final decree determining the water rights of each claimant. I.C. § 42-1413.

The United States contends that the McCarran Amendment, 43 U.S.C. § 666, which waives the United States' immunity from suit in water adjudications, does not waive immunity from filing fees. On the other hand, the State of Idaho asserts that the plain language of the McCarran Amendment waives any obstruction to the payment of filing fees. The State of Idaho asserts that the issue of whether the McCarran Amendment waives immunity to filing fees has been previously adjudicated in *United States v. Oregon Water Resources Dep't*, 774 F.Supp. 1568 (D. Or. 1991); *In re the General Adjudication of all Rights to Use Water on the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988), *affirmed by an equally divided court*, 492 U.S. 406, 109 S. Ct. 2994 (1989); and, *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1983). These cases fail to fully address the contentions of the United States, therefore, we deem it necessary to discuss at some length the issue on appeal.

Both the United States and the State of Idaho urge that this is a "simple" case of statutory construction.

It is a fundamental principle of jurisprudence that the United States is immune from suit unless it consents to be sued. *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 59 S. Ct. 516 (1939). This immunity extends to barring an individual state from suing the United States unless the federal government consents to such suit. *Minnesota v. United States*, 305 U.S. 382, 59 S. Ct. 292 (1939). Only the United States Congress can grant such consent to be sued. *United States v. Sherwood*, 312 U.S. 584, 61

S. Ct. 767 (1941); *Morrison v. Work*, 266 U.S. 481, 45 S. Ct. 149 (1925). Absent a waiver of sovereign immunity by Congress, the United States cannot be sued. *Loeffler v. Frank*, 486 U.S. 549, 108 S. Ct. 1965 (1988).[2] The waiver of immunity must be expressed in the statutory text in question and not from extraneous sources. *United States v. Nordic Village, Inc.*, 1992 Slip Op. 90-1629; *Dellmuth v. Muth*, 491 U.S. 223, 228-29, 109 S. Ct. 2397, — (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142 (1985).

Once a waiver of sovereign immunity is found to exist, "those conditions must be strictly observed, and exceptions are not to be lightly implied." *Block v. North Dakota*, 461 U.S. 273, 287, 103 S. Ct. 1811, 1820 (1983). The extent of the waiver is not to be extended beyond the "clear and unambiguous" language of the statute. *Hancock v. Train*, 426 U.S. 167, 179, 96 S. Ct. 2006, 2013 (1976). While being careful not to enlarge a waiver of soveign immunity beyond that which is expressed in the language that Congress used in the statute, a court should remember the "broad and just purpose which the statute was designed to effect" to help in determining the extent of the waiver. *Indian Towing v. United States*, 350 U.S. 61, 68, 76 S. Ct. 122, 126 (1955).

Library of Congress v. Shaw, 478 U.S. 310, 106 S. Ct. 2957 (1986), involved a lawsuit involving Title VII of the Civil Rights Act of 1964. The act authorized an award of back pay and reasonable attorney fees. The act also contained the language that "the United States shall be liable for costs the same

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[2] Following argument, the United States Supreme Court on February 25, 1992, decided another waiver of sovereign immunity case in *United States v. Nordic Village, Inc.*, 1992 Slip Op. 90-1629.

as a private person." 42 U.S.C. § 2000e-5(k). The plaintiff, Shaw, prevailed in the action and was awarded attorney fees. The trial judge increased the award by 30% to compensate the attorney for the delay in receiving payment for the services rendered. The Library of Congress appealed, alleging that the increase in compensation was disguised interest and was therefore, improperly awarded. The United States Supreme Court recognized the long-standing rule that the United States was immune from an interest award. In determining whether Congress had waived immunity from interest, the Court turned to two different phrases in the statute.

First, the Court looked at the phrase, "the same as a private person." The Court determined that this phrase had to be construed with the long-standing prohibition against an interest award. The Court determined that this was not an express waiver of immunity.

The Court also declined to find a waiver of immunity in the statutory requisite of awarding "reasonable" attorney fees. The Court held than an award of interest could not be read into the term "reasonable." Without the express use of language indicating a waiver of immunity from paying interest, there could be no interest award.

I.

Because of a need to adjudicate *all* rights to the use of a water system, it has been held that the McCarran Amendment authorizes the adjudication of the United States' water rights, including "appropriate rights, riparian rights, and reserved rights." [3] *United*

[3] "Reserved" rights are those rights reserved, either expressly or impliedly, by the United States and are exempt from appropriation. *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908). Generally, these rights consist of those rights reserved by treaty with the Indians. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S. Ct. 3201 (1983); *see also In re Rights to Use Water in Big Horn River*, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court*, 492 U.S. 406, 109 S. Ct. 2994 (1989); *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976). But these rights also include those obtained by the U.S. prior to granting Statehood to a territory by the riparian doctrine or for the purpose of maintaining navigable stream flows, *United States v. Rio Grande Dam & Irri. Co.*, 174 U.S. 690, 19 S. Ct. 770 (1899); and other rights created by the U.S. when it held land as a territory. *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905).

States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 524, 91 S. Ct. 998, 1002 (1971). An adjudication contemplates more than just determining those rights acquired by appropriation, but all rights, however acquired or reserved, to use water from a water system.

Being cognizant of these well-established principles, we turn to the act of Congress involved in this case. The pertinent statute is 43 U.S.C. § 666(a), which states:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty,

> and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

The United States correctly asserts that the first sentence of the McCarran Amendment waives any objection by the United States that it is immune from joinder in water adjudications. The United States asserts that the language of the first sentence:

> where it appears that the *United States* is the owner of or is in the process of acquiring water rights *by appropriation under State law*, by purchase, by exchange, *or otherwise*, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a) (emphasis added), must be read in conjunction with the second sentence. The second sentence reads in part:

> The United States, when a party to any such suit, shall (1) be deemed to have waived any right *to plead* that *the* State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, . . .

43 U.S.C. § 666(a) (emphasis added). The United States argues that the use of the term "plead" indicates that the provision applies to legal defenses and that "the State laws" of the second sentence refers back to the phrase "appropriation under State law" contained in the first sentence. Reading these two phrases together, the United States maintains that the provision simply bars the United States from claiming

that *the laws pertaining to appropriation under state law* are inapplicable, and that this language does not waive immunity from paying filing fees. The United States asserts that if Congress had intended to waive immunity to filing fees, it would be necessary for Congress to use the term "all" instead of the term "the."

This argument fails for several reasons. First, the term "any such suit" contained in the second sentence has to refer to the "defendant in any suit" language of the first sentence. The McCarran Amendment defines any suit as a "suit (1) for the adjudication of rights to the use water of a river system or other source, or (2) for the administration of such rights." Subjecting the United States to these types of suit would necessarily subject the United States to those state laws necessary to carry out these types of suits, as they entail more than just mere appropriation. Congress recognized a need to allow the States to control the adjudication. To hold otherwise would allow the United States to plead immunity from those procedural rules contained in the statute and any other rule or statute pertaining to a water adjudication or administration suit, but not directly pertaining to the appropriation of water, that the United States found inconvenient or objectionable. This would then allow the federal government to control the process of adjudication and not the individual states, which is contrary to the clear language of 43 U.S.C. § 666(a).

Second, the suggestion that Congress needed to use the word "all" to indicate a waiver of immunity from filing fees leads to an absurd result. The use of the term "all State laws" would subject the federal government to all state laws, not just those laws necessary for the adjudication or administration of water use. This would be a much broader waiver than necessary

or contemplated by the statute, and would also subject the United States to determination of issues other than water rights and runs afoul of the recent holding of the United States Supreme Court in *United States v. Nordic Village, Inc.*, 1992 Slip Op 90-1629.

Congress, in 43 U.S.C. § 666(a), when referring to "appropriation under state law, by purchase, by exchange, or otherwise," uses the word "law" in its singular form, but when referring to the "United States as a party to such suit" (an adjudication) uses the plural word "laws." This language selection clearly subjects the United States to all laws concerning an "adjudication," not just the law of appropriation. As previously stated, if the United States were only subject to the law of appropriation, and not the laws concerning a suit for adjudication or administration, the federal government would then be able to plead immunity and effectively control the adjudication. This is contrary to the clear language of the statute.

The United States Supreme Court in *Nordic Village*, found sections 106(a) and (b) of the Bankruptcy Code to *clearly express* a waiver of immunity by the United States as to "monetary liability." The language of 43 U.S.C. § 666(a), just as plainly as the Bankruptcy Code did in 106(a) and (b), express a "clear intent" of congress to subject the United States to all of the state court processes of an "adjudication" of its water rights with the sole exception of costs.

The employment of alternative statutory construction techniques is not required in analyzing 43 U.S.C. § 666(a) unless it is for the purpose of attempting to strain the plain statutory language to reach some preordained result.

No hypothetical, no alternate construction technique, can limit or alter the clear waiver of immunity of 43

U.S.C. § 666(a), nor cause "costs" to mean "filing fees."

II.

As another basis to support immunity from filing fees, the United States asserts that at the time the McCarran Amendment was passed, the western states allowed a judgment for costs at the end of litigation, but did not impose a filing fee. While it is true that each of the fourteen western states had some provision for shifting costs at the end of litigation, at least six did charge a fee for filing a notice of claim.[4] It is interesting to note the filing fee schedule of the state of Nevada, Senator McCarran's home state. Nevada had a variable filing fee schedule very similar to I.C. § 42-1414. Therefore, Congress could not have contemplated that no filing fees were being charged. Additionally, *Nordic Village* instructs us not to look to extraneous matters to find a clear waiver. To follow this path urged by the United States in this case would be error.

III.

Next, the United States argues that the filing fee imposed by the state is a disguised judgment for cost. There is a tendency to confuse the terms fees and costs; and although often used indiscriminately, the two terms are distinguishable. *Galpin v. City of Chicago*, 159 Ill. App. 135 (1910), *aff'd*, 249 Ill. 554, 94 N.E. 961 (1911). Each term has a peculiar and separate meaning in the law. *Parks v. Sutton*, 60 Utah 356, 208 P. 511 (1922). It has long been recognized that "costs" is a term of known legal significance and

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[4] Arizona, California, Colorado, Nevada, Oregon, and Washington.

differs from "fees." *Alexander v. Harrison*, 2 Ind. App. 47, 28 N.E. 119 (1891). "Costs" are a pecuniary allowance or a reimbursement made to the prevailing party in a lawsuit and are recoverable from the losing party. *Weiner v. Swales*, 217 Md. 123, 141 A.2d 749 (1958). Costs are sometimes referred to as incidental damages and are awarded to indemnify or reimburse a party for expenses incurred. *Hayman v. Morris*, 37 N.Y.S.2d 884 (1942); *People v. Goulding*, 275 Mich. 353, 266 N.W. 378 (1936). Costs are usually awarded upon a final determination of the litigation. *Foley v. Carter*, 214 App. Div. 292, 212 N.Y.S. 381 (1925).

"Fees" on the other hand, are distinguishable from costs. *Clay v. Overseas Carriers Corp.* 61 F.R.D. 325 (D. Penn. 1973). In its usual and ordinary context, a fee is a charge for a privilege or a service under the control of the government, *City of Kettering v. Berger*, 4 Ohio App. 3d 254, 448 N.E. 2d 458 (1982), such as a filing fee. *People v. Goulding*, 275 Mich. 353, 266 N.W. 378 (1936). Fees do not come within the term costs. *In re Terry*, 67 Misc. 514, 123 N.Y.S. 258 (1911). While costs are the charges that a party may recover from the opponent, fees are those amounts paid to the court. *Copper Liquor v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982). Stated simply, fees are compensation paid to an officer, such as the court, for services rendered to individuals in the course of litigation. *Bradley v. State*, 69 Ala. 318 (1881); *Tillman v. Wood*, 58 Ala. 578 (1877).

An interesting case that illustrates the difference between a fee and costs is *Bohart v. Anderson*, 24 Okla. 82, 103 P. 742 (1909). In *Bohart*, counsel for plaintiff wished to file a petition without paying the

required filing fee. Instead, plaintiff's counsel wished to post a bond for costs in case his petition was unsuccessful. In denying counsel's request, the Oklahoma Supreme Court stated that there is a well recognized difference between costs and fees. While costs are an allowance to the prevailing party, fees are an expense payable to the court in advance. The court held that without payment of the filing fees, the clerk of the court could lawfully withhold his or her services until the fee was paid.

We decline to read the term judgment for costs as including the term filing fees. Each term has a plain and ordinary meaning in the law, and each term had been in use in and applied in its plain meaning in the western states when Congress passed the McCarran Amendment.

The United States places emphasis on the fact that the Department of Water Resources is the party initiating the instant suit and the United States is a defendant. Thus, the United States asserts that the expenses incurred by the Department of Water Resources in performing the adjudication are actually "costs" incurred by a party litigant. This argument misses the mark. A general water adjudication brought by the state is analogous to an interpleader action. *United States v. Bluewater-Toltec Irri. Dist.* 580 F. Supp. 1434 (D.N.M. 1984), *aff'd sub nom., United States on behalf of Acoma & Laguna Indian Pueblos v. Bluewater-Toltec Irr. Dist.*, 806 F.2d 986 (10th Cir. 1986). The position of the director of the Department of Water Resources is analogous to the "stakeholder" in an interpleader action. The director is really a disinterested party. The only interest the director has is to see that all rights are accurately

adjudicated. The director does not oppose a claim, trying to subvert a valid claim. Nor does the director stand to gain if a claim is invalidated. "The United States has entered the suit asking that its rights be determined." *New Mexico v. Molybdenum Corp. of Am.*, 570 F.2d 1364, 1366 (10th Cir. 1978). Thus, the United States is "a water applicant" or claimant seeking affirmative relief from the state and not a "defendant." *United States v. Bell*, 724 P.2d 631, 647 (Colo. 1986) (Erickson, J., specially concurring). We determine this argument to be without merit.

IV.

The final argument that the United States makes concerns an asserted conflict within the Idaho Code. The United States asserts that I.C. § 42-1408A(1)(j), which deals with the contents of the notice of order commencing the general adjudication, exempts the federal government from paying filing fees. Idaho Code § 42-1408A(1)(j) states:

> [S]ection 42-1414, Idaho Code, requires each claimant, other than those exempted by federal law, to pay a variable fee with a notice of claim; failure to pay the fee will result in rejection of the notice of claim; failure to file a timely notice of claim will result in the assessment of a late fee in the amount of fifty dollars ($50.00) or fifteen per cent (15%) of the original filing fee, whichever is greater.

It is asserted that this language conflicts with I.C. § 42-1414 which states:

> [T]he department of water resources shall accept no notice of claim required under the provi-

> sions of section 42-1409, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant.

The United States urges that § 42-1408 recognizes that the federal government is exempt from filing fees. In support of this argument, the United States points to portions of the Idaho State Legislative Advisory Committee report regarding the filing fees. In the committee report, an economist commented that the federal government could be exempt from paying filing fees. We find no merit in the federal government's contention. The plain langauge of I.C. § 42-1414 imposes a filing fee upon all claimants, there is no exception for the United States to be exempted from its provisions. Idaho Code § 42-1408A(1)(j) does not affect the obligation imposed by I.C. § 42-1414 of paying filing fees upon the filing of a "Notice of Claim to a Water Right."

V.

For historical purposes only and not as a basis for construing 43 U.S.C. 666(a), we note the following. Congress, in passing 43 U.S.C. 666(a), recognized that:

> In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

> In 1877 the Congress, in the Desert Land Act of 1877 (19 Stat. L. 377, Ch. 107), severed the water from the land, and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all the nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act . . .

S. Rep. No. 755, 82d Cong., 1st Sess., 3 (1951).

Thus, the Desert Land Act of 1877[5], recognizes the right of the western states[6] to legislate the appropriation of the waters within its borders. *California Oregon Power Co. v. Beaver Portland C. Co.*, 295 U.S. 142, 55 S. Ct. 725 (1935). While the basics of the doctrine of prior appropriation is the same from state to state, the doctrine has evolved to meet the specific needs of each state and thus differs among the western states. *The Doctrine of Prior Appropriation and the Changing West* (Report of the Western States Water Council, 1987). Congress understood this fact and that is why the laws concerning appropriation were left up to each individual state.

It is also clear that Congress envisioned the anarchy that would ensue in the United States were immune from suit in adjudication cases. Congress realized:

> It is most clear that where water rights have been adjudicated by a court and its final decree

[5] 43 U.S.C. § 321 *et seq.*

[6] California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. 43 U.S.C. § 323.

> entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State Courts. . . . The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.
>
> The committee believes that such a situation cannot help but result in a chaotic condition.

S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951). As Congress realized, under the law of prior appropriation, all water users are interrelated. The amount of water one user consumes affects the

amount of water available for other water users. If the United States had remained immune, a water adjudication would serve no useful purpose. If the state was unable to include the United States, there would be no way to determine the rights of private users.

CONCLUSION

We hold that the McCarran Amendment waives soverign immunity and subjects the United States to the laws of Idaho in the Snake River Basin Adjudication including the payment of filing fees. Therefore, we affirm the ruling of the district court denying the petition of the United States.

No costs on appeal.

BAKES, C.J. and BISTLINE, J., concur.

BISTLINE, J. concurring in the opinion of McDevitt, J:

I.

In this past week this Court has received from the Supreme Court of the United States its recent opinions in *United States v. Nordic Village, Inc.*, S. Ct. No. 90-1629 (1992). That opinion appears to be pertinent to the above entitled case which this Court has had under consideration since we heard oral argument in January 1992. As is readily observed, Justice McDevitt has expressed his views in writing what may become the majority opinion. Justice Johnson has favored the members of the Court with his differing views as has Justice Boyle. A reasonable inquiry is to ascertain what effect, if any, *Nordic Village has* on the controversy still before us.

Initially it is to be noted that this Court's opinions in *In Re Snake River Basin Water System*, 115 Idaho

1, 764 P.2d 78 (1988), show that Justice Johnson wrote the opinion for the Court. Although three justices joined that opinion, I wrote a sole dissenting opinion at 115 Idaho 10-11, 764 P.2d 88-89. The views which I expressed were mine and mine alone. Now, when the majority of four justices appears to be presently not all of the same mind in regard to the sequel *Snake River Basin* controversy now before us, and with *Nordic Village* now at hand, it is in order that my views be expressed for what they may be worth.

Rather than recapitulate or synopsize, perhaps it is better that my short opinion written in 1988 be displayed for the benefit of interested readers. In doing so, those paragraphs which to my mind are the more applicable are emphasized:

> The claim of the irrigation districts and the water districts, and the user memebrs thereof, as I understand the claim to be, is not that they assert any new water rights, but simply challenge the right of the state of Idaho in the person of its legislature to cause to be relitigated that which has been litigated, or to readjudicate that which has been adjudicated and gone to a final judgment.
>
> It has been held that a water right is a property rights. An adjudicated water right is a highly perfected water right. It is the decree or judgment of a state district court, and once wholly final is subject to no attack other than that it was fraudulently obtained. The McCarran Report, partially reprinted in the majority opinion, at 7-8, 764 P.2d at 84-85, acknowledges that 'the State courts are vested with the jurisdiction necessary and proper . . . for the admin-

istration of and adjudication of water rights under state laws.' This has always been my understanding. I agree with the Report in the statement that *in practically every case all water users on a stream are interested parties to any court proceeding.* I am not persuaded that all such water users *are necessary parties* in all cases, in the sense that the action cannot proceed without a state court (here, Idaho) gaining jurisdiction over them. A water user having a valid state judicial decree in his pocket, meaning one that flows from a valid court decree, will be interested, of course, but not necessarily a necessary party. Else, why, one might ask, what has he gained by having once successfully litigated, if into litigation once again he will be forced?

The pertinent portion of the McCarran Report, at 7, 764 P.2d at 84, as I comprehend its language, is that it has in mind only those water users claiming a water right by reason of the ownership of the United States or any of its departments who seek to don the cloak of immunity which does shield the United States of America. The McCarran Act itself shreds that assumed cloak.

I take no umbrage with the final paragraph of the Report which is reprinted in the majority opinion, at 7, 764 P.2d at 84, *i.e.*, 'that it is essential that each and every owner *along a given water course*, including the United States, must be amenable to the law of the State, . . .' My understanding is that prior litigation on the tributaries of the Snake River afforded all owners on those rivers or streams the opportunity to be involved. If the opportunity to litigate was pres-

ent but eschewed, the litigation is nevertheless as final as to those who did not choose to participate as to those who did so. Such an action was basically *in rem.*

The McCarran Act undoubtedly is, as Justice Johnson has written, a Congressional waiver of otherwise unassailable federal immunity as to actions for stream adjudications brought in Idaho courts. The so-called 'special appearance' of the United States District Attorney for Idaho is in my view of no consequence. The law heretofore has been that the United States can only be sued by its consent, and if district attorneys are freely empowered to give or withhold that consent, I am woefully ignorant of that change. As for my part, until I become better informed, the United States of America, and each and all of its departments, agencies, bureaus, and whatever, are in court because of the McCarran Act, or, conversely, are not in court because of that Act's inapplicability, which I much doubt, and on which issue I agree with Justice Johnson's opinion.

But, accepting that the United States may be subject to jurisdiction of an Idaho state district court, I am left wondering how that conclusion necessitates a holding that water right users possessing valid judgments or decrees and, probably valid water rights of any degree, can be brought into this action against their will.

As mentioned above, it can be said confidently without citation that an adjudicated water right is a property right. Like any other property, it can be forfeited or abandoned, but there is no such claim here. Like any other property, it can

be taken by such authorities as have the power of eminent domain, but a just compensation must be paid therefore.

Although feeling not obliged to search for authority in that vein, a study of Justice Johnson's opinion reassures me when I read on page 14 of the slip opinion his ten line excerpt from *California v. Rank*, 293 F.2d 340, in which litigation the state of California was positioned as is Idaho in this litigation, *i.e.*, the defendant. The plaintiffs in that action were owners of the beneficial use of the river of the San Joaquin River below the dam. The United States over its protest was joined as a necessary party defendant.

What I make out of reading that case as it definitely has application to the case at hand, is that '. . . the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain.' Rank, *293 F.2d at 354. And, '[w]hile a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights.' Id. at 354. Presently, the United States of America is not attempting to seize or otherwise appropriate any property rights. In fact, all that we see is the claim of the United States District Attorney, Idaho, that the United States is not in court.*

I am unable to see the grounds upon which the state of Idaho can force the owners of valid water rights to litigate that which is res judicata. *Nor do I understand how the legislature can purport to authorize such. The legislature is prohibited by two constitutions from impairing the obligation of contract, and in my humble view,*

an adjudicated water right, especially one with whiskers, is on an even higher plane than a contract.

Until better informed, I must respectfully dissent, and am deeply concerned with the plight which the state of Idaho has brought down on the innocent owners of water rights in Idaho. Those water rights are not free-hanging merchandise like tires and beer, but are appurtenant to lands which lands for the most part would be greatly devalued without water rights. To make such owners parties to this litigation is tantamount to an impermissible restraint on the right of free alienability of land.

In Re Snake River Basin Water System, 115 Idaho at 10-11, 764 P.2d at 88-89 (emphasis in original and added).

II.

With the foregoing background out of the way, turning first to Justice McDevitt's opinion, correctly noted therein is the genesis of this on-going litigation, *i.e.*, the 1985 legislature's enactment of I.C. § 42-1406A, most provisions of which the reader will find displayed in footnote 2 of Justice McDevitt's opinion.[7] Justice McDevitt, following his review of

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[7] Omitted therefrom immediately following I.C. § 42-1406A(1) and (2), is (3)(b) which mandates that the director "[m]ay petition the district court to commence an adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington. The director may include within his petition under this paragraph any unadjudicated tributaries. The director shall not include in the petition filed under this paragraph any adjudicated tributary unless

applicable law, reaches the conclusion that the United States is required to pay a filing fee to the clerk of the district court. In other words, immunity from paying fees has been waived. Presently I am not persuaded of any error in his analysis.

III.

Finally, turning to the *Nordic Village* opinions which we recently received, once again I find that those two highly esteemed jurists on the United States Supreme Court, Justice Stevens and Justice Blackmun, have provided the necessary guidance. First, their dissent nicely brings attention to what the majority has done in the area of sovereign immunity:

> An officer of an insolvent corporation appropriated corporate funds and used them to discharge a personal tax obligation. Because the Federal Government was the ultimate recipient of the stolen property, the Court holds that the bankruptcy trustee cannot avoid the transfer. The interest in a rigid interpretation of the doctrine of sovereign immunity outweighs the interest in equitable treatment of general creditors and shareholders of the corporate debtor. This result is neither necessary nor just.

Nordic Village, S. Ct. No. 90-1629, slip op. at 1 (Stevens, J. dissenting). Their assessment that the Court, speaking through the opinion of Justice Scalia, condones an injustice is readily accepted, as is also

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the United States, or other parties who[se] consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666."

true of the statement that the Court's interest in a rigid interpretation of the doctrine of sovereign immunity does not outweigh the equitable treatment of general creditors and shareholders of the corporate debtor. The Court evades this conclusion by hypothesizing "plausible" alternatives of the statute, by refusing to consider its legislative history, and by reiterating the Court's view that waivers of immunity must be strictly construed.

The entire content of the opinion with its veritable footnote history of criticisms of the doctrine of sovereign immunity are well worth the reading. The views of Justices Stevens and Blackmun are well-stated and convincing. Presently, although the controversy laid before us comes in the context of a huge adjudication of water rights, and is not a bankruptcy outgrowth, my regard for the views of Justices Stevens and Blackmun, guide me to agree with Justice McDevitt, who has appropriately reached the correct conclusion.

QUAERE: Is this action, which arose in state district court and is now pending in this Court, such a suit as is contemplated in § 666, 43 U.S.C., *California v. Rank*, 293 F.2d 340, (9th Cir. 1961)? [8]

ANSWER: It so appears to be, Accordingly I concur in Justice McDevitt's opinion.

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[8] Action there was initiated in state district court, and on defendants' motion removed to the United States District Court under the provisions of 2 U.S.C. 1441(a), *Rank v. Krug*, 90 F. Supp. 773 (D.C. 1950).

JOHNSON, J., dissenting.

I must respectfully dissent from the Court's opinion. In my view, by the McCarran Amendment the United States did not waive its sovereign immunity to the payment of "filing fees" in the SRBA.

Let us not becloud what the issue is here. The "filing fees" the state seeks to charge the United States are not the usual modest fees for filing pleadings in a lawsuit. The "filing fees" at issue here exceed TEN MILLION DOLLARS! Of this amount, eight and one-half million dollars represent "filing fees" for the adjudication of "reserved" rights, which are described in footnote 3 of the Court's opinion.

Although the United States has not premised its appeal on the applicability of the filing fee requirement to these reserved rights, the "Adjudication Rules and Regulations" of the Department of Water Resources require payment of filing fees only by "[a]ll persons filing claims to water rights acquired under state law or amendments to claims to water rights acquired under state law." Reserved rights by their nature are not acquired under state law.

What is at issue here is requiring the United States to fund involuntarily a significant part of the cost of the SRBA, that was occasioned by the dilemma created by the decision of this Court in *Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 661 P.2d 741 (1983). *In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988) gives a brief history of how the SRBA came into being. The long and short of it is that the Idaho Power Company and the State of Idaho set the SRBA in motion. The United States is just along for the ride, pursuant to the McCarran Amendment.

By this decision, the Court rules that the United States must pay these "filing fees" to help the Idaho Power Company and the State of Idaho carry out the SRBA. The Court's opinion says the "filing fees" are not "costs," which are prohibited by the McCarran Amendment. "Rose is a rose is a rose is a rose is a rose." Gertrude Stein, "Sacred Emily," *The Oxford Book of American Light Verse*, p. 293 (W. Harmon ed., Oxford University Press 1979).

By the McCarran Amendment, the United States consented to joinder as a defendant in a "general adjudication." *In re Snake River Basin Water System*, 115 Idaho at 6-9, 764 P.2d at 84-87. The plain reading of the McCarran Amendment indicates that the United States did not waive its sovereign immunity to the payment of costs. The Court's attempted distinction between "filing fees" and "costs" would be more persuasive if these were, in fact, filing fees. These "filing fees" are nothing more nor less than the State's costs for conducting the SRBA. By the McCarran Amendment, the United States waived its sovereign immunity only so far as being joined as a defendant, not so far as involuntarily paying the costs of the litigation.

BOYLE, Justice, dissenting.

I agree with the majority that "[a]bsent a waiver of sovereign immunity by Congress, the United States cannot be sued," *ante* at 5, (citing *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965 (1988)), and that the conditions of a waiver "must be strictly observed, and exceptions are not to be lightly implied." *Ante* at 5 (quoting *Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 1820 (1983)). I also agree with the majority that the extent of any waiver must be artic-

ulated in the "clear and unambiguous" language of the statute. *See ante* at 5-6 (citing *Hancock v. Train*, 426 U.S. 167, 179, 96 S.Ct. 2006, 2013 (1976)). However, in my view, the majority does not correctly apply the United States Supreme Court's test for determining whether the statutory waiver of sovereign immunity in the instant case is "clear and unambiguous." As a result, the majority reaches a conclusion which is at odds with the Supreme Court's recent pronouncements. Accordingly, I respectfully dissent.

In *United States v. Nordic Village, Inc.*, slip op., 90-1629 (1992), the most recent pronouncement on the issue of statutory waivers of sovereign immunity, the Supreme Court clarified that its "clear statement" rule has two components. A statutory waiver must be grounded exclusively upon the statutory text (the textual requirement) and the waiver must be "unequivocal" (the unequivocal requirement). *See id.* at 7 (citing *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S.Ct. 2818 (1989) (Eleventh Amendment case) and *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397 (1989) (Eleventh Amendment case)). These two requirements have been developed from an impressive number of recent opinions in both the context of statutory waivers of federal government immunity, *see, e.g., Ardestani v. INS*, 502 U.S. ——, 112 S.Ct. 515 (1991); *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957 (1986); *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349 (1980), and in the context of state sovereign immunity protected by the Eleventh Amendment, *see, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. ——, 111 S. Ct. 2578 (1991); *Hokman v. Connecticut Dep't of Income Maintenance*,

492 U.S. 96, 109 S.Ct. 2818 (1989); *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989), as well as in other contexts, *see, e.g., Gregory v. Ashcroft*, —— U.S. ——, 111 S. Ct. 2395 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989). Although I candidly admire the skillful attempt by the majority opinion to make *Nordic Village* appear to support its position, it simply does not.

The textual requirement simply means that all evidence of a purported waiver of sovereign immunity must be found exclusively within the statutory text. The Court in *Nordic Village* defined this requirement from its cases in the Eleventh Amendment context. The Court stated,

> Contrary to respondent's suggestion, *legislative history has no bearing on the ambiguity* [*of a statute*]. As in the Eleventh Amendment context, *see Hoffman*, 492 U.S., at 104, the "unequivocal expression" of elimination of sovereign immunity that *we insist upon is an expression in statutory text.* If clarity does not exist there, *it cannot be supplied by a committee report. Cf. Dellmuth v. Muth*, 491 U.S. 223, 228-229 (1989).

Nordic Village, Slip op., at 7 (emphasis added). The Court's reference to *Dellmuth* in the above quote is instructive. In the context of the Eleventh Amendment, the Court stated that nontextual arguments were "beside the point." *Dellmuth*, 491 U.S. at 230, 109 S.Ct. at 2401. As emphasis, the Court went on:

> Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended

to abrogate sovereign immunity *only* if its intention is "*unmistakably clear in the language of the statute.*" [*Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147 (1985)]. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, *evidence of congressional intent must be both unequivocal and textual.* Respondent's evidence is neither. In particular, we reject the approach of the Court of Appeals, according to which, "[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest." [*Pennsylvania v. Union Gas Co.*,] 839 P.2d at 128. Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Agreement. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

Dellmuth v. Muth, 491 U.S. at 230, 109 S.Ct. at 2401 (emphasis added). The rule pronounced in *Atascadero* is the same rule at issue in this instant case, namely, that a waiver of sovereign immunity will only be found by a "clear and unambiguous" statement in the language of the statute. *See majority opinion ante* at 5-6. Accordingly, to meet the textual requirement for a waiver under the United States Supreme Court's clear statement test, the legislative

history of a statute, *see Nordic Village*, slip op., at 7, the purpose of a statute, *see Ardestani*, 502 U.S. at ——, 112 S. Ct. at 521, and even equitable considerations, *see id.*, are all irrelevant.

Notwithstanding the emphatic admonition by the United States Supreme Court to ignore non-textual evidence, the majority opinion in this instant case concludes that "costs" do not equal "fees" by an appeal to all non-textual sources. The text of the McCarran Amendment nowhere states that the term "fees" is excluded from the definition of "costs." To reach its conclusion the majority primarily relies on cases from other jurisdictions. *See ante* at 10-11. These cases do not purport to construe the term "costs" as it is used in 43 U.S.C. 666(a) and many of these opinions were decided long before the McCarran Amendment was enacted. *Id.* Where the Supreme Court has so clearly and emphatically limited the search for meaning to the text of the statute, the majority's attempt to use the definition of costs from other courts and in contexts outside the McCarran Amendment clearly runs afoul of the textual requirement articulated in *Nordic Village*.

In addition, notwithstanding the majority's historical background disclaimer, *see ante* at 12, the majority opinion in this instant case places subtle reliance on a Senate committee report accompanying the passage of McCarran Amendment. *See ante* at 12-14. As noted above, the United States Supreme Court specifically rejected committee reports as permissible considerations in determining the unequivocal words of a statute. *See Nordic Village*, slip op., at 7. Moreover, the majority's reference to a report of the Western States Water Council, *ante* at 13, and its references to the filing fees provisions of the

various western states at the time the McCarran Amendment was passed, *ante* at 10, are unacceptable considerations because they are not contained within the textual statutory provisions of the Amendment itself. While these considerations may be helpful in other contexts, the United States Supreme Court has emphatically stated that when interpreting whether Congress has eliminated sovereign immunity, the words contained within a statute are the only considerations that may be considered by a court. *Nordic Village*, slip op., at 7.

The underlying rationale supporting the exclusion of all nontextual evidence is that the words of the statute alone must provide unequivocal evidence that Congress intended to reject federal sovereign immunity. Paraphrasing what the Court stated in *Dellmuth*, if Congress' intention is "unequivocally expressed," *Nordic Village* slip op., at 3 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. ——, —— (1990) (slip op., at 6)); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1969), in the words of a statute, then recourse to legislative history or other nontextual evidence of abrogation will be unnecessary; if Congress' intention is not "unequivocally expressed" in the statute itself, then recourse to nontextual materials will be futile, because by definition the clear statement test for waivers of sovereign immunity will not be met. *See Dellmuth*, 491 U.S. at 230, 109 S.Ct. at 2401. By considering nontextual material in the instant case the majority fails to adhere to the first requirement of the United States Supreme Court's test. More importantly, by so doing, the majority opinion fails to recognize that the second requirement of the test, the unequivocal textual

waiver requirement, is also not met by the text of the McCarran Amendment.

Under the unequivocal requirement, the United States Supreme Court has erected various rules of construction that weigh heavily against a statutory waiver. The Supreme Court's test does not merely attempt to give the words of the statute their best meaning. Instead the Court requires a search for an "unequivocal expression" in the language of the statute that leaves no doubt that the specific waiver in question "was affirmatively and separately contemplated by Congress." *Library of Congress v. Shaw*, 478 U.S. 310, 315, 106 S. Ct. 2957, 2962 (1986).

While the language of the statute is obviously the starting point for its analysis, *see Ardestani v. INS*, 502 U.S. ——, ——, 112 S.Ct. 515, 519 (1991), the United States Supreme Court has employed various construction techniques which limit a finding of waiver. In *Nordic Village*, the Supreme Court employed a technique which it borrowed from its Eleventh Amendment cases that may be called the "alternate-interpretation" rule. Under this rule, the existence of any reasonable statutory interpretation that does not entail a waiver of sovereign immunity is enough to illustrate that the statute is not an unequivocal expression of a federal waiver. This approach was employed in *Dellmuth v. Muth*, 491 U.S. at 231-32, 112 S. Ct. at 2402, and *Hoffman v. Connecticut*, 492 U.S. at 100-03, 109 S.Ct. at 2822-23, to ignore what were possibly the best interpretations of the statute, because other alternate interpretations existed.

In *Nordic Village* the Court used this approach when it entertained various alternate, hypothetical, constructions of the statute at issue. The Court did

not suggest that these interpretations were necessarily correct. Rather its point was that because these interpretations were merely plausible, they demonstrated that the statute did not unequivocally waive the federal government's sovereign immunity. The Court concluded this unique approach to statutory interpretation with these words: "[t]he foregoing are assuredly not the only readings of subsection (c), but they are plausible ones—which is enough to establish that a reading imposing monetary liability on the Government is not unambiguous and therefore should not be adopted." *Nordic Village*, slip op., at 7.

When there are doubts as to the unequivocal expressions of a statute the Supreme Court has resolved these doubts against a finding of waiver. The Court has noted that

> the traditional principle that the [Federal] Government's *consent* to be sued "*must be 'construed strictly in favor of the sovereign,' McMahon v. United States*, 342 U.S. 25, 27 (1951), and *not 'enlarge*[*d*] *. . . beyond what the language requires,*" *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)), [is] a rule of construction that we have had occasion to reaffirm once already this Term, see *Ardestani v. INS*, 502 U.S. ——, —— (1991) (slip op., at 7-8) (1991).

Nordic Village, slip op., at 4 (emphasis added.)

The Court's reference in *Nordic Village* to *Ardestani* is instructive because in that case the United States Supreme Court appeared to recognize that its clear statement test accompanied by its strict rules of construction yielded a result at odds with the

clearly defined purpose of the statute. Nevertheless, the Court rejected the petitioner's argument that the federal government had waived its immunity under the Equal Access to Justice Act (EAJA) for deportation proceedings. The Court stated:

> Finally, we consider Ardestani's argument that a functional interpretation of the EAJA is necessary in order to further the legislative goals underlying the statue. The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.
>
> We have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important. We acknowledge that Ardestani has been forced to shoulder the financial and emotional burdens of a deportation hearing in which the position of the INS was determined not to be substantialiy justified. But we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statu[t]e, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise.

Ardestani, 502 U.S. ——, ——, 112 S.Ct. 515, 521 (1991).

The Supreme Court has frankly stated that "[t]he purpose of the rule is to permit the Government to

'occupy an apparently favored position.'" *Library of Congress v. Shaw*, 478 U.S. at 315-16, 106 S. Ct. at 2962 (quoting *United States v. Verdier*, 164 U.S. 213, 219, 175 S. Ct. 42, 44 (1896)). Based on these strict and well established rules of construction, the search for an affirmative declaration demonstrating a unequivocal expression of statutory waiver in the instant case is difficult indeed. It is clear that nowhere does the McCarran Amendment indicate or suggest that the federal government has waived its sovereign immunity for the purpose of assessing filing fees against it. Rather, the statute merely states that the United States will "be deemed to have waived any right to plead that [the] State laws are inapplicable" in a state water adjudication suit. The specific "State laws" referred to in 43 U.S.C. § 666(a) are nowhere mentioned. While the majority appears to conclude that the best interpretation of "State laws" is to find a waiver of sovereign immunity for all state laws involved in the water adjudication, including state laws requiring the payment of fees, this conclusion is not compatible with the two-part test required by the Supreme Court. The statute is capable of being construed as waiving sovereign immunity only to the extent of "State laws" which are necessary to the appropriation of water. Because the filing fee requirement is not necessary for determining who has a water right, this interpretation is at least "plausible." As a waiver of immunity is not to be "enlarge[d] . . . beyond what the language requires," *Nordic Village*, slip op., at 4; *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)), a construction of the statute limiting the federal government's waiver should be applied.

Moreover, the specific portion of 43 U.S.C. § 666 (a) limiting the federal government's waiver so "[t]hat no judgment of costs shall be entered against the United States" in water adjudication suits also leads to exactly the opposite inference as that drawn by the majority. While the majority labors valiantly to demonstrate the difference between costs and fees, it is also at least "plausible," to use the standard of *Nordic Village*, slip op., at 7, that the term "costs" was meant to include the filing fees at issue in this case. Even the majority acknowledges that "[t]here is a tendency to confuse the terms fees and costs." Ante at 10. As a plausible statutory interpretation, the explicit reservation of sovereign immunity for costs should be "construed strictly in favor of the sovereign." *Nordic Village*, slip op., at 4 (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

The majority's holding rests in substantial part on its determination that Congress meant only to exclude "costs" but not "fees" from its waiver of sovereign immunity. While I appreciate the technical distinction attempted by the majority, a distinction which part III of the majority opinion reveals has never been made in Idaho until today, from the point of view of Congress a monetary charge by any name represents "costs" to the federal government. To expect Congress to have drawn a technical distinction between costs and fees when the majority recognizes that the two terms are "often used indiscriminately," *ante* at 10, is unrealistic in my view. Therefore, to construe the McCarran Amendment to merely forbid a waiver of "costs," and then allow a state to afterward enact laws imposing "fees," will only invite verbal manipulations by states aimed at avoiding federal sovereign immunity.

The majority recognizes that the textual and unequivocal requirements of *Nordic Village* present the proper analysis for this case. *See ante* at 5. Nevertheless, it refuses to follow the United States Supreme Court's analysis and holding because it will lead to a "preordained result." *See ante* at 9.

Under this Court's construction of the McCarran Amendment, the state now has no limit on the fees it can charge the federal government in this adjudication. The federal government cannot avoid being joined in this adjudication because of the McCarran Amendment, and multiplying the potential fee exposure by all the states subject to the McCarran Amendment, it is readily apparent why the United States Supreme Court is so concerned about limiting statutory waivers in all cases solely to those areas that were obviously contemplated by Congress.

Notwithstanding these concerns, the majority indicates that if it held otherwise, the "United States would effectively control the adjudication." *Ante* at 9. While apparently forgetting whose laws control and which sovereign is waiving its immunity, the majority allows the state to control not only the adjudication, but also how much the United States must pay for the privilege of adjudicating what state law cannot take away without its express consent. While my heart is with the majority, a reading of the McCarran Amendment and the United States Supreme Court cases addressing the sovereign immunity waiver issue will not lead to that result.

Because it is clear under the United States Supreme Court's cases that the McCarran Amendment does not provide an unequivocal statutory waiver of sovereign immunity for filing fees, I respectfully dissent.

APPENDIX B

[R. 1068-1071]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
IN THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER DRAINAGE BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

UNITED STATES; STATE OF IDAHO; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System, RESPONDENTS

JUDGMENT AND ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR,
ALTERATIVELY, FOR DECLARATORY AND
INJUNCTIVE RELIEF AND MOTION
FOR AN ACCOUNTING

DESCRIPTIVE SUMMARY

The United States filed a Petition for Writ of Mandate or in the Alternative for Injunctive Relief and Declaratory Relief, Document No. 89-06-008, on June 30, 1989. Some issues were resolved by summary judgment. Issue Nos. 3 and 4 came on regularly for trial before the court sitting without a jury on January 31, 1991. In addition, the United States filed a Motion for Judgment after Trial and for an Accounting, Document No. 91-02-09. This Judgment and Order finally resolves all issues raised by the Document Nos. 89-06-008 and 91-02-09. By this Judgment and Order, that petition, Document No. 89-06-008, and motion, Document No. 91-02-09, are denied.

JUDGMENT AND ORDER

On June 30, 1989, the United States filed a Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief, together with a supporting memorandum, affidavits and exhibits. The State of Idaho filed a Memorandum in Opposition, together with an appendix of affidavits and exhibits, on October 30, 1989, to which the United States filed its Consolidated Reply Memorandum on December 12, 1989, with additional exhibits and affidavits. Idaho Power Company, et al. also filed a brief in support of the State. Argument was heard on December 18, 1989, on issues of law raised by that Petition.

On December 20, 1989, the Court entered an order directing all parties to "file any and all challenges to filing fees required by State Statute in this general stream adjudication," and an Order requiring the United States to file a statement of all issues and

challenges to the filing fees in this action. The United States timely filed such a statement, listed 20 issues or challenges to the filing fee requirement, and redesignated the issues argued on December 18, 1989 as Issue Nos. 1 and 2.

On January 16, 1990, the District Court, by Minute Order, denied the United States' Petition for Writ of Mandate on Issue Nos. 1 and 2 argued at the December 18, 1989 Status Conference. Subsequently, on April 17, 1990, the State of Idaho moved for Partial Summary Judgment on Issue Nos. 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18 set forth in the United States' List of Issues. That motion was fully briefed and argued, and the Court entered its Memorandum Decision and Order on December 27, 1990, granting partial summary judgment to the State of Idaho on those ten issues. At a pretrial conference on January 14, 1991, the United States and State of Idaho requested the District Court to clarify its Memorandum Decision and Order Granting Summary Judgment entered on December 27, 1990. The District Court treated this request as a further motion for summary judgment by both parties and entered a Memorandum Decision on January 24, 1991 in favor of the State of Idaho on Issue Nos. 1 and 2.

Issue Nos. 3 and 4 were the subject of a trial, which took place on January 31 through February 6, 1991. At the conclusion of the trial the parties requested that the District Court allow post-trial briefing on the remaining issues. The United States stipulated that Issue Nos. 5 and 6 were subsumed in the ruling on Issue No. 1 and withdrew Issue Nos. 15, 19 and 20.

The United States submitted a post-trial brief on Issue Nos. 4 and 16 seeking judgment in its favor or, in the alternative, an accounting. The State and Idaho

Power Company also submitted post-trial briefs seeking judgment in their favor. On April 11, 1991, the Court entered its third Memorandum Decision ruling in favor of the State of Idaho on those issues which were heard at trial as well as on those issues which were the subject of post-trial briefing.

The Court has heard the testimony and reviewed the exhibits admitted into evidence, as well as the aforementioned memoranda, affidavits, and exhibits, submitted by the parties on the various issues raised by the United States, and has directed that judgment be entered in accordance therewith resolving all issues raised for determination by the United States' Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief is hereby DENIED.
2. The United States' Motion for An Accounting is hereby DENIED as premature.
3. Each party shall bear its own costs.

DATED this 21 day of May, 1991.

DISTRICT COURT

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

APPENDIX C

[R. 852-889]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
IN THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER DRAINAGE BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

THE UNITED STATES; THE STATE OF IDAHO; and all claimants to the use of water from the Snake River Basin Water System, DEFENDANTS

MEMORANDUM DECISION ON THE STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON FILING FEES

State of Idaho Motion for Partial Summary Judgment on issues numbered 7, 8, 9, 10, 11, 12, 13, 14,

17 and 18 in the UNITED STATES LIST OF ISSUES REGARDING IDAHO'S "FILING FEES". *Granted.*

The State of Idaho seeks partial summary judgment on issues numbered 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18 raised by the United States in its list of issues relating to the statutory requirement to pay filing fees in the Snake River Basin Adjudication. The United States alleges these issues as grounds supporting its Petition for Writ of Mandamus compelling the Director of the Idaho Department of Water Resources to accept all United States claims to water rights without the payment of filing fees set forth in I.C. § 42-1414.

The State's motion for partial summary judgment is reviewed under the well settled legal principles governing such motions. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any issues of material fact exist, all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, must be construed in the light most favorable to the non-moving party, I.R.C.P. 56(c); *Sewell v. Nielson, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985). Where a motion for summary judgment is supported by facts of record, the opposing party may not rest upon bare allegations or denials in its pleadings. *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984).

With these principles in mind each of the numbered issues will be discussed in turn.

I.

THE TAKINGS CLAUSE

Whether the "filing fee" enforcement mechanism of I.C. Code § 42-1415 (Supp. 1989) results in a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution as well as provisions of the Idaho Constitution, including Article 1, § 14.

(Issue No. 7, United States List of Issues at 6.)

The resolution of this issue rests upon a review of the statutory scheme enacted by the Idaho legislature implementing the filing fees provisions of the Snake River Basin Adjudication. I.C. § 42-1409(6) requires that, "[a]ll claimants of water rights that are included in a general adjudication shall file with the director a notice of claim. . . ." The director of the Department of Water Resources may not accept a notice of claim unless it is submitted with the statutory filing fee (I.C. § 42-1414). Further, the director, in executing his duties in an adjudication, may only conduct an examination of a water right for which a notice of claim has been filed (I.C. § 42-1410) and may not abstract or determine water rights to be included in the director's report unless a notice of claim has been filed (I.C. § 42-1411).

To enforce these notice of claim and filing fee requirements, the legislature provided that, ". . . failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which a required notice of claim was not filed. . . ." (I.C. § 42-1408A(1)(c)). Further, where the payment of a filing fee is to be paid in installments

under I.C. § 42-1414(3) and the claimant fails to meet a scheduled payment, the director ". . . may prohibit the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication . . . ." (I.C. § 42-1415).

While the United States, as stated in Issue No. 7, only claims that I.C. § 42-1415 is constitutionally deficient, it argues in all its briefs that I.C. § 42-1414 may also violate the federal government's due process rights as an unconstitutional taking without compensation. Both statutes will be considered in this opinion.

The claim that the filing fee requirement in the Snake River Basin Adjudication is an unconstitutional taking without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution must fail. It has been held many times that the due process protections of the Fifth Amendment, made applicable to the states under the Fourteenth Amendment, do not extend to the United States. *United States v. City of Jackson*, 318 F.2d 1, 8 (5th Cir. 1963); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665, 96 S.Ct. 2333, 2336, 49 L.Ed.2d 124 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1965); *Economic Development and Industrial Corp. of Boston v. United States*, 11 Ct. Cl. 682, 688 (1987); *Economic Development and Industrial Corp. of Boston v. United States*, 546 F. Supp. 1204, 1214 (D. Mass. 1982). This is also the position the United States has adopted in similar litigation in the federal courts in which the government has affirmatively asserted that it is not a "person" protected by the Fifth and Fourteenth Amendments to the United States Constitution. *United States v. South Coast Air Qual-*

ity Management District, 748 F.Supp. 732 (D.C.C.D. Ca. 1950).

Therefore, as a matter of law, summary judgment must be entered in favor of the State of Idaho and against the United States on the federal government's claim that the filing fee provisions of the adjudication statute violate the due process protection against taking property without just compensation under the United States Constitution.

The United States also asserts that the filing fee portions of the adjudication statute violate Article 1, § 14 of the Idaho Constitution which provides that ". . . private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." However, it fails to explicate any reason that it is afforded more protection under the Idaho Constitution than under the United States Constitution. This court is aware of none. It is found that the United States is not a "person" afforded the due process protection of the Idaho Constitution. Should the Idaho "takings" clause be found to apply to the United States, the claim advocated here would fail. Neither I.C. § 42-1414 nor 42-1415 provides for a "taking" of property.

In Idaho, a water right is a property interest entitled to constitutional protection against taking to that just compensation. *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977). It must be noted that the United States makes no claim that the adjudication statutes, in any way, violate its procedural due process rights. The United States specifically claims that a decree which excludes the federal government's water rights because it declined to pay

what it calls "exorbitant" fees would amount to a taking of property without compensation.

The loss of water rights occasioned by their exclusion from a decree in the Snake River Basin Adjudication for a holder's failure to pay filing fees is not a taking of property for public use. The Idaho Supreme Court has stated, "[I]t is well settled that the water itself is the property of the state, which has the duty to supervise the allotment of those waters with minimal waste to private appropriators." *Nettleton v. Higginson*, 98 Idaho at 90, citing Idaho Constitution Article 15 § 1. The claim and filing fee procedures of the adjudication statute constitute a reasonable exercise of the state's constitutional responsibilities with respect to water. The state may condition the continued right to the use of water on reasonable actions required by law on the part of the owner. *Texaco Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). Failure of an owner to pay filing fees in the Snake River Basin Adjudication is the equivalent to the abandonment of that owner's property interest to the water which may be claimed in this action. The result of the owner's neglect is not a taking of the property by the state for public use, but rather the entry of a court decree which does not include the abandoned water right. The action of the court is predicated on a failure of the owner to place his water right before the court for review and entry in the decree. The loss occasioned by this failure is the equivalent to the entry of judgment against a party who fails to carry his burden of proof. It is upon this failure of proof that an owner who does not pay the required filing fee ultimately looses his water right. In reviewing state action with respect to property rights, the United States Supreme Court has held that:

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable action imposed by law, this court has never required the state to compensate the owner for the consequences of his own neglect. We have concluded that the state may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking". *Texaco v. Short*, 454 U.S. at 530.

More recently, the Supreme Court has reaffirmed the authority of the state to regulate property rights. Significantly, the Supreme Court has held:

> Even with respect to vested property rights, the legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties. (citations omitted.) "Legislation readjusting rights and burdens is not unlaw-

> ful solely because it upsets otherwise settled expectations."

United States v. Locke, 471 U.S. 84, 104, 105 S.Ct. 1785, 1797, 85 L.Ed. 64 (1985), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed. 782; (1976).

Statutory regulation of water rights through the adjudication process is common to western states. Similarly, failure to comply with claim procedures in those states may result in the forfeiture of water rights by exclusion from decrees. *See*, Ariz. Rev. Stat. Ann. § 45-254 (1987); Mont. Code Ann. § 85-2-226 (1989); Or. Rev. Stat. § 539.210 (1989); Utah Code Ann. § 73-4-9 (1989); Wyo. Stat. Ann. § 41-4-310 (1977). It has not been held in any western state that the forfeiture of a water right for failure to take the reasonable statutory steps for its protection constitutes the taking of property for public use without just compensation. In reviewing its adjudication statute, the Washington Supreme Court has declared that any person who fails to file the required statement of claim is conclusively deemed to have "waived and relinquished any right, title or interest in said right." *In The Matter of Chumstick Creek Drainage Basin*, 103 Wash.2d 698, 694 P.2d 1065, 1069 (1985). It, therefore, appears that there is no legal support for the United States' claim that the loss of water rights for the failure to pay filing fees constitutes an impermissible taking of property for public use without just compensation.

The United States further argues that *Texaco v. Short*, 458 U.S. 516 (1982), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 631 (1978) require this court

to employ a balancing test, weighing the interest of the state in its regulatory scheme against the individual rights of water claimants, to determine whether the filing fee statutes amounts to a taking of property. The United States, however, fails to place of record any objective facts which allow this court to engage in such a weighing process. The United States simply declares that:

> . . . Idaho has imposed what is in reality an unreasonable and exorbitant tax upon all water right claimants, exceeding $11 million dollars for the United States alone. The economic impact upon all water right claimants is substantial and confiscatory. (U.S. Memo. in Opposition to Motion for Partial Summary Judgment at 31.)

These assertions represent conclusions for which there is presently no support in the record. While the United States argues that such evidence can be presented at trial and, therefore, summary judgment is inappropriate, its position is legally insufficient to resist the instant motion. The burden is upon the party resisting a motion for summary judgment to place facts on the record establishing either entitlement to judgment in its own right or a genuine issue of material fact upon which the matter must proceed to trial. The United States, after more than 18 months since filing its Petition for Writ of Mandamus, relies merely on its pleadings and these conclusory assertions in opposing the motion. The only conclusion this court may draw is that there exists no genuine issue of material fact and that the State of Idaho is entitled to judgment as a matter of law.

Therefore, summary judgment is entered in favor of the State of Idaho and against the United States

with respect to the United States' claim that the filing fees required under the adjudication statutes constitue a taking of property for public use without just compensation in violation of both the Idaho and United States Constitutions.

II.

THE COMMERCE CLAUSE

> Whether Idaho's "filing fees" scheme or the enforcement provisions or both violate the commerce clause, Article 1, § 8 of the United States Constitution. (Issue No. 8, United States List of Issues at 6.)

The issue presented is whether Idaho filing fees violate the Commerce Clause of the United States Constitution. To decide this issue, it must first be determined whether the United States has standing to maintain an action under the Commerce Clause.

A. Standing to Maintain Action Under The Commerce Clause.

The State of Idaho admits that state regulation of water comes within the realm of the Commerce Clause and is subject to congressional regulation because water is transported across state boundaries and is used for agricultural purposes which have a worldwide market. *Sporhase v. Nebraska*, 458 U.S. 941, 953-54, 102 S.Ct. 3456, 3462-63, 73 L.Ed.2d 1254 (1982). Although water is subject to congressional regulation under the Commerce Clause, the state is not prevented from regulating its water resources. *Sporhase v. Nebraska*, 458 U.S. at 954. The State argues, however, that this does not give the United States standing to bring suit under the Commerce Clause. The State asserts that because the United States' ownership and operation of property subject to the Snake River Basin Adjudication is within the State of Idaho, it does not come within the scope of the Commerce Clause.

To determine whether the United States has standing, it is necessary to know whether the government's basis for the claim is as a party with proprietary rights by reason of ownership of land within the State of Idaho or whether it is attempting to "promote the interest of all". The United States has failed to inform this court under which basis it is challenging the filing fees under the Commerce Clause.

"A proprietary interest provides a nonstatutory basis for standing of private persons and would provide a basis for the United States to sue . . . ." *United States v. City of Jackson*, 318 F.2d 1, 15 (5th Cir. 1963). Assuming that the United States' claim under the Commerce Clause is based on its proprietary right as an Idaho land owner and on its pecuniary interest in the controversy, it is found that it has standing to sue. However, the claim fails under the explicit terms of the Commerce Clause.

The Commerce Clause states that Congress shall have the power to "regulate commerce with foreign nations, and among the several states. . . ." U.S. Constitution, Art. 1 § 8. "[T]he foundation of our analysis is the basic principle that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402, 104 S.Ct. 1856, 1865, 80 L.Ed.2d 388 (1984), quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 323, 97 S.Ct. 599, 606, 50 L.Ed.2d 514

(1977). "As used in the Constitution, the word "commerce" . . . includes transportation, purchase, sale, and exchange of commodities between the citizens of the *different states.*" *Carter v. Carter Coal Co.*, 298 U.S. 238, 298, 56 S.Ct. 855, 867, 80 L.Ed. 1160 (1936). (emphasis added). Because the United States' proprietary interest comes from the ownership and operation of property *within the state* and not a different state, it cannot be granted relief under the Commerce Clause.

If the United States' claim is premised on "promoting the interests of all", it also has standing. "[T]he Commerce Clause in itself prohibits obstructions to interstate commerce and . . . the United States has standing to sue for injunctive relief to enforce the Commerce Clause." *United States v. City of Jackson*, 318 F.2d at 14, citing *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed 1092 (1895). "The obligations which it [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." *United States v. City of Jackson*, 318 F.2d at 14, quoting *In re Debs*, 158 U.S. at 584.

Although the United States has not stated its position as acting to "promote the interests of all", this court will proceed as if it had. Then the issue becomes who has the burden of proof to show a burden or lack thereof on interstate commerce.

B. Burden of Proof

The test for Commerce Clause challenges to state regulation of natural resources is well-established:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citations omitted).

However, before this test can be applied it must be shown that the statute is discriminatory. The State of Idaho asserts that I.C. § 42-1414 makes no distinction based on the interstate nature of claims, nor unfairly burdens out-of-state individuals or entities. It also argues that the distinctions in filing fees are based solely on the use to which the water is put, irrespective of whether the use, or the benefit of the use, accrues to in-state or out-of-state individuals or entities.

The United States claims that the statute is discriminatory and, therefore, the burden falls to the state to prove that the statute serves a legitimate local purpose and that this purpose can not be served by less discriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). However, the United States fails to show how the statute is discriminatory, relying only on its bold assertion in an attempt to pass the burden to the State of Idaho.

This court does not agree with the United States' claim that the statute is discriminatory. Without evi-

dence that the statute is discriminatory in its application, the only cognizable claim the United States may assert is that the statute is discriminatory on its face. I.C. § 42-1414, on its face, shows no discrimination between in-state and out-of-state water rights holders. *Everyone* claiming a water right must file a notice of claim submitted with a filing fee based solely on the nature of the use.

The United States, by its own admission, states that the burden of proof is on the State of Idaho *once the statute is shown to be discriminatory.* However, the burden is on the United States to show that the statute is discriminatory. This, the federal government has failed to do.

Where the statute is non-discriminatory and applied even-handedly, the Pike Test requires the United States to show that the burden the statute places on interstate commerce is other than incidental or that the burden is clearly excessive. *Pike v. Bruce Church*, 397 U.S. 137 (1970). Once this is shown, the burden shifts to the State to demonstrate that there is a legitimate local purpose to support such a burden on interstate commerce. The United States has presented no evidence to show any burden on interstate commerce. Therefore, the burden has not shifted to the State of Idaho.

Assuming that the United States is attempting to enforce the Commerce Clause to "promote the interest of all", it has standing. However, the United States must show that the statute challenged is discriminatory or that the burden it places on interstate commerce is excessive and not merely incidental. The United States has not presented evidence on either prong of the Pike test which would establish the existence of a genuine issue of material fact. Therefore, as a matter of law, the State of Idaho is entitled to summary judgment on this issue.

III.

WATER RIGHTS CREATED UNDER FEDERAL LAW

> Whether Idaho's "filing fees" may be imposed upon federal or Indian water rights reserved or otherwise created under federal law which "are not dependent upon state law or state procedures, . . ." *Cappaert v. United States*, 426 U.S. 128, 145 (1976), and which are merely abstracted in the director's report. I.C. § 42-1411 (Supp. 1989).
>
> (Issue No. 9, United States List of Issues at 6.)

To the extent this claim is based on the proposition that reserved water rights of the United States created under federal law are to be treated differently in the Snake River Basin Adjudication than federal rights claimed under state appropriation laws, the petitioner cannot prevail as a matter of law. The Idaho Supreme Court, following the lead of the United States Supreme Court, has held that:

> In *United States v. District Court, County of Eagle, Colo.*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), the Supreme Court affirmed a Colorado decree holding that 43 U.S.C. § 666, 66, Stat. 560, (generally known as the McCarran amendment), constituted consent to have the water rights of the United States adjudicated in a state court. In doing so, the court held that 43 U.S.C. § 666 was an all inclusive statutory provision that subjects to general adjudication in state proceedings all water rights of the

> United States to water within a particular state's jurisdiction, regardless of how they were acquired. In so holding, the Supreme Court specificially held that reserved water rights were included within the purview of § 666.

Avondale Irrigation Dist. v. North Idaho Prop., Inc., 96 Idaho 1, 3, 523 P.2d 818, 820 (1974).

The Idaho Supreme Court went on further to hold that,

> We hold that under 43 U.S.C. § 666, the United States is bound by Idaho State law, and therefore must quantify the amount of water claimed under the reservations doctrine at the time of the general adjudication of water rights.

Avondale Irrigation District v. North Idaho Properties, Inc., 96 Idaho at 4-5.

This Idaho Supreme Court decision is fully consistent with that expressed by the United States Supreme Court in *Cappaert v. The United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). *Cappaert* stands for the proposition that federal water rights are not dependent upon state law or state procedures and may be adjudicated in state or federal court since federal courts also have jurisdiction to adjudicate United States water rights claims. *Cappaert* further holds that the McCarran Amendment is not a substantive statute requiring the United States to perfect its water rights claims in the state forum. However, the Supreme Court acknowledged that the McCarran Amendment waived sovereign immunity where the United States is joined as a party in a state court general adjudication of an entire stream system and, therefore, the United

States may be required to adjudicate its water rights in the state forum.

In its brief, the United States fails to draw the correct distinction in the terminology used in *Cappaert*. Under *Cappaert*, the United States, having waived its sovereign immunity under the McCarran Amendment, must appear in a qualified state court adjudication not for the purpose of perfecting its water rights, but rather to adjudicate its water rights. It would appear that, in drawing this distinction, the Supreme Court means that the perfection of water rights relates to the acquisition of legal entitlement to water rights under the law. However, it also appears the Supreme Court means that the United States may be required to have its existing water rights, whether perfected or acquired under federal or state law, quantified in a state court general stream adjudication. This court does not find that the holding in *Cappaert* is in any way inconsistent with the holding in *United States v. District Court in and for the County of Eagle, Colo.* or that of the Idaho Supreme Court in *Avondale Irrigation District v. North Idaho Properties, Inc.* Therefore, the United States has waived sovereign immunity in this general stream adjudication and since the filing fees for reserved water rights are the same as those imposed on all other claimants, the United States' objection must fail.

Finally, with respect to this issue, the United States claims that by applying a filing fee to federal water rights, Idaho has effectuated a diminution in the value of federal property by means of a tax on that property. The government argues that if it fails to pay the filing fees, the property will be diminished in value as a result of the enforcement mechanisms

in I.C. §§ 42-1414 and 1415, which would disallow inclusion of United States water rights in the court's decree. This issue is appropriately raised by the United States in Issues No. 4 and 5 of the United States List of Issues and will be decided in that context.

In conclusion, reviewing United States Issue No. 9, there exists no genuine issue of material fact and the State of Idaho shall be awarded judgment as a matter of law.

IV.

DUE PROCESS

> Whether federal and state guarantees of due process are violated by requiring defendants in a water rights adjudication suit to pay substantial fees merely to file their claims with the plaintiff—State of Idaho at the risk of losing their water rights?
>
> (Issue No. 10, United States List of Issues at 7.)

The issue presented is whether the filing fee portions of the adjudication statutes violate the due process protections afforded the United States under the Fifth and Fourteenth Amendments of the United States Constitution.

The interesting aspect of the United States' challenge is that it has taken the exact opposite position in other litigation where this issue has arisen. In the case of *United States v. South Coast Air Quality Management District, et al.*, 748 Fed. Supp. 732, (D.C.C.D. Ca. 1990), the court found:

> The United States asserts that the United States is not afforded protection under the Fifth or Fourteenth Amendments because the United States is not a "person" protected by these laws.

> The[ ] United States supported this position by citing the following cases: *The United States v. City of Jackson, Mississippi*, 318 F.2d 1, 8 (5th Cir. 1963); *Pennsylvania v. New Jersey*, 427 U.S. 660, 665, 96 S.Ct. 2333, 2336[,] 49 L.Ed.2d 124 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24[,] 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966).
>
> The United States was correct in the position advocated to the Federal District Court in California. Therefore, the State of Idaho is entitled to summary judgment as a matter of law.

V.

THE APPROPRIATIONS CLAUSE

> Whether the McCarran Amendment, 43 U.S.C. § 666, may be read broadly to permit states to impose "filing fees" and other monetary assessments upon the United States and its property, and whether such a broad reading would result in an unconstitutional delegation to the states of congressional authority to appropriate money.
>
> (Issue No. 11, United States List of Issues at 7.)

The United States asserts that the McCarran Amendment does not authorize the expenditure of money or the creation of financial liability on the part of the United States. The State of Idaho argues that the McCarran Amendment creates a liability on the part of the United States for the payment of adjudication filing fee, but whether there are appropriations for the payment of those fees has no bearing on the legality of the liability created.

This court finds that the McCarran Amendment does create a liability on the United States to pay

filing fees when a claim to a water right is filed under I.C. § 42-1414. The McCarran Amendment provides, in part, that,

> "[t]he United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty . . . ."

By waiving sovereign immunity, the McCarran Amendment creates a liability which requires the United States to pay filing fees in a state court general stream adjudication. The existence of a liability is not contingent upon the existence of an appropriation to pay that liability. "[T]he mere failure of Congress to appropriate funds . . . does not in and of itself defeat a Government obligation created by statute." *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966).

The power to appropriate is one given to congress to direct the Secretary of Treasury to draw money from the Treasury. When a claim is filed with the Department of Water Resources, that claim must be accompanied by a filing fee. Idaho is not seeking a Writ of Mandamus or other court order requiring the United States to pay a filing fee. It is only when the United States files a claim under I.C. § 42-1414 that a fee is required and until a fee accompanies the claim, that claim will not be accepted.

By paying adjudication fees in other state adjudications, the United States has, in some measure, acknowledged its responsibility to pay filing fees under the McCarran Amendment. Since the United States had or obtained the authority to pay fees in those other adjudications, it has the same authority

and, therefore, the same ability to pay them here. It is irrelevant that the fees for this adjudication are larger than those paid in other adjudications. Each agency of the United States anticipating the filing of claims in an adjudication has the responsibility to pay the filing fees from existing funds or seek a specific appropriation from Congress to meet its statutory obligations.

Therefore, the filing fee statutes and Idaho's interpretation of the McCarran Amendment do not result in an unconstitutional delegation to the state of the congressional authority to appropriate. The McCarran Amendment and the adjudication statutes only create a liability. How that liability is paid is the responsibility of the United States when it files claims for water rights. The United States has not shown the existence of any genuine issue of material fact which would preclude the entry of summary judgment on this issue. Therefore Idaho, as a matter of law, is entitled to summary judgment.

VI.

THE ANTI-DEFICIENCY ACT

Whether Idaho's requirement that substantial "filing fees" accompany the claims of the United States violates the Anti-Deficiency Act, 31 U.S.C. § 1341, 1349-1351, and 1511-1519 which prohibits the United States from expending money which has not been appropriated by Congress. If the fees may be imposed upon the water rights of the United States, must the United States be afforded time to seek and obtain from Congress appropriations of money to pay the "fees" before any such "fees" become due.

(Issue No. 12, United States List of Issues at 7.)

The sixth issue presented is whether Idaho's requirement for payment of filing fees violates the Anti-Deficiency Act, 21 U.S.C. § 1341. The United States argues that this act prohibits payment of adjudication fees because those fees are not "authorized by law". Idaho, however, cites several statutes authorizing the United States to pay the fees imposed by I.C. § 42-1414:

> 1) Section 8 of the Reclamation Act of 1902 requires the Bureau of Reclamation to comply with all aspects of state water law, including the paying of filing fees.
>
> 2) 16 U.S.C. § 17j-2 provides that "Appropriations for the National Park Service are authorized for . . . investigation and establishment of water rights in accordance with local custom, law, and decision of courts . . . ."
>
> 3) 16 U.S.C. § 526 provides: "There are authorized to be appropriated for expenditures by the Forest Service such sums as may be necessary for the investigation and establishment of water rights . . . and protection of water rights . . . ."

Based on the existence of these statutes, the United States is precluded from arguing that the payment of adjudication filing fees is not "authorized by law". Moreover, the United States has paid adjudication fees in other state adjudications. This fact indicates that the payment of adjudication fees is "authorized by law".

Assuming that there is no appropriation "authorized by law" for the adjudication, and ignoring the fact that the United States has paid adjudication fees in the past, Idaho argues that lump sum appropriations can be used for the authorized purpose of

paying adjudication filing fees. The United States counters claiming that, through the appropriation process, agencies must follow the budget estimates submitted to congress when spending their subsequent appropriations, even when the appropriation is a lump sum.

As cited by Idaho, the United States Department of Justice, in an opinion by its legal counsel, indicates that lump sum appropriations may be used for any authorized purpose.[1] In fact, several of the federal agencies involved in this adjudication have appropriations that include lump sum appropriations whose stated purpose is to pay adjudication filing fees. Idaho has cited the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 701 (1989) as an example of a lump sum appropriation that may be used to pay adjudication filing fees.[2]

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[1] "The Comptroller General has taken the position that a lump sum appropriation may be used for any authorized purpose, even if the legislative history of the appropriation statute prescribes specific priorities with regard to allocating funds among authorized purposes. . . . By the same token, the absence in the terms of an appropriations act of a prohibition against certain expenditures under that appropriation implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds among activities or functions within a particular lump sum account. . . ."

"We believe that, as a general matter, the agency head's discretion to reprogram appropriated funds within or among programs in a lump sum account in an antideficiency situation would be limited only if a specific statutory directive required the expenditure or distribution of funds in a particular manner." 0B—*Opinion of the Office of Legal Counsel, DOJ* 701, 702-03 (June 20, 1980).

[2] $778,419,000 for "expenses necessary for the management, operation, and maintenance of areas and facilities adminis-

The United States' argument that no appropriations exist and that the use of "lump sum" appropriations is not authorized, and, as such, the payment of filing fees constitutes a violation of the Anti-Deficiency Act, is unconvincing. Therefore, there being no genuine issue of material fact, Idaho is entitled to summary judgment as a matter of law.

VII.

THE DISCLAIMER CLAUSE

Whether applying Idaho's "filing fees" scheme and I. C. §§ 2-1414 and 1415 (Supp. 1989) violates Article 21, § 19 of the Idaho Constitution whereby the people of the State of Idaho "forever disclaim[ed]" all right, title and jurisdiction over federal property and Indian lands and further agreed, "That no taxes shall be imposed by the state on the lands or property therein belong-

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tered by the Nation Park Service . . . and for the general administration of the National Park Service . . . ." (103 Stat. at 706).

$1,035,534,000 "for . . . management, development, and improvement and protection of resources . . . under the jurisdiction of the Bureau of Indian Affairs including payment of irrigation assessment and charges, acquisition of water rights . . . ." (103 Stat. at 713).

$1,149,232,000 "for necessary, expenses of the Forest Service, not otherwise provided for, for management, protection, improvement and utilization of the National Forest System . . . ." (103 Stat. at 723).

$63,433,000 "for expenses necessary to carry out the provisions of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 4601-4-11), . . . and for the acquisition of land or waters, or interests therein, in accordance with statutory authority applicable to the Forest Service . . . . (103 Stat. at 724).

ing to, or which may hereafter be purchased by, the United States, or reserved for its use.

(Issue No. 13, United States list of Issues at 8.)

The issue presented is whether the Idaho filing fee statutes violate Art. 21, § 19 of the Idaho Constitution in which the state disclaims all right, title, and jurisdiction over federal property and Indian lands (the Disclaimer Clause). The United States argues that Idaho's attempted imposition and enforcement of its filing fees in the adjudication process is inconsistent with the Disclaimer Clause in the Idaho Constitution. It asserts that the McCarran Amendment does not give Idaho the right to interfere with or destroy the property of the United States or Indian Tribes.

Idaho counters arguing that Art. 21, § 19 of the Idaho Constitution does not disclaim the state's right to seek filing fees from the federal government and that the fees are imposed to find governmental services, not to obtain interests in land. This court agrees.

In support of its position, Idaho notes that the language of the Disclaimer Clause in the Idaho Constitution is almost identical to that found in the constitutions of Arizona, New Mexico, and Wyoming. These states, as well as the Tenth Circuit Court of Appeals, have rejected the argument that the disclaimer language should be interpreted to prohibit the adjudication of water rights despite the authority given the states under the McCarran Amendment. *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658, 669 (1985); *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014, 1015 (1976); *In re the General Adjudication of All Rights to the Use of Water in the Big Horn River System*, 753 P.2d 76,

87 (Wyo. 1988); *Jacarilla Apache Tribe v. United States*, 601 F.2d 1116, 1130 (10th Cir. 1979). The intention of the disclaimer language is to ensure the supremacy of federal policy and law, and therefore, disclaimers should not be interpreted in a manner which would undermine federal policy. *Big Horn*, 753 P.2d at 87.

The Idaho Supreme Court has interpreted Art. 21 § 19 to allow the state to accept jurisdiction over Indian lands to the extent that federal law allows. *State v. Marek*, 112 Idaho 860, 866, 736 P.2d 1314 (1987). In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564, 103 S.Ct. 3201, 3212, 77 L.Ed.2d 837 (1983), the United States Supreme Court held that disclaimer language in the state constitution was not to be construed so as to prevent adjudication under the McCarran Amendment. It ruled that to do so would "enervate the Amendment's objective" of allowing comprehensive adjudications in state court. The same reasoning applies to state authority over non-Indian federal water rights.

The United States further argues that the filing fees are a tax and the disclaimer language bars taxation of the United States beyond that found in the Supremacy Clause. Whether the filing fees constitute a tax is not an issue to be decided in this motion for partial summary judgment.

Finally, the United States has presented no evidence upon which to decide this Disclaimer Clause issue. A party may not rest on mere allegations of the pleadings. The United States has not presented any genuine issue of material fact which bar summary judgment. Therefore, on this issue, Idaho is entitled to summary judgment as a matter of law.

VIII.

THE CONSTITUTIONAL RIGHT TO APPROPRIATE WATER

Whether the filing fee enforcement mechanism of I.C. 42-1415 (Supp. 1989) temporarily or permanently denies water users the right to appropriate water in violation of Article 15, § 3 of the Idaho Constitution which provides that "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . ."

(Issue No. 14, United States List of Issues at 8.)

The United States raises the issue of whether Idaho's filing fee enforcement mechanism, I.C. § 42-1415, violates the Idaho Constitution's protection of the right to divert and appropriate water. It argues that there is a conflict between I.C. § 42-1415 and Article 15 § 3 of the Idaho Constitution. The United States asserts that I.C. § 42-1415 authorizes the state to prohibit the diversion and use of water pursuant to a claimed or decreed right in clear contravention of the state constitutional guarantee that diversion and appropriation of water "shall never be denied".

Idaho denies the existence of a conflict explaining that Article 15, § 3 applies only to statutes denying a claimant the right to make an initial appropriation of water. *State Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974); *State Water Conservation Bd. v. Enking*, 56 Idaho 722, 58 P.2d 779 (1936). The state argues that the constitutional provision is limited only to the right to appropriate or divert "unappropriated" waters. Thus, the right only applies when someone tries to divert or appropriate unappropriated waters.

I.C. § 42-1415 does not deny a claimant the right to appropriate unappropriated water nor does it attempt to deny the right to appropriated water. It merely regulates the manner in which a claim to a water right may be verified. The adjudication process is a method of verifying or quantifying an acquired or existing water right. The statutory requirements are a means to accomplish a complete and successful adjudication.

The United States then argues that the "denial" of a water right for failure to pay a filing fee is not within the limited police power of the state over water users. This court disagrees.

The Idaho Constitution provides that, "The use of all waters . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law." Idaho Const., Art. 15, § 1. It has been long recognized that the state has the duty to supervise the apportionment and allotment of water being diverted. *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 64 (1960). The state holds an interest and title to all water within the state, not "in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common right of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity." *Walbridge v. Robinson*, 22 Idaho 236, 241-42, 125 P. 812, (1912). As further evidence of this police power, Idaho cites *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). In *Nettleton*, the court upheld a statute authorizing water masters to close the headgates on diversions having no adjudicated, decreed, permitted, or licensed water rights. Therefore, as stated by Idaho, the state has the responsibility and

power to ensure that the water is properly allocated among all water users.

In the Snake River Basin Adjudication, the claimant has the duty to obtain verification and quantification of its water right. This occurs through the adjudication process. The first step for verification and quantification is the filing of a claim in compliance with I.C. § 42-1414. Any failure to do so does not result in a denial of rights by the state, but a self-inflicted harm by the claimant's lack of action. The *Nettleton* decision did not imply that requiring the claimant to bear the expense of adjudicating a water right would constitute a "denial" of such right. *Nettleton v. Higginson*, 98 Idaho at 91-92.

By whatever method a party claims a water right, appropriation, adjudication, decree, permit or license, the state has the power to define the conditions under which the holder of the right may continue to divert water where it is necessary to further the state's interest in the efficient use of water resources. To adopt the United States' interpretation, that failure to pay the filing fee is a denial prohibited by the Idaho Constitution Art. 15 § 3, would forever prevent the state from adjudicating water rights and render the McCarran Amendment impotent.

There being no genuine issue of material fact, the State of Idaho is entitled to summary judgment as a matter of law on this issue.

IX.

THE IDAHO ADJUDICATION STATUTE REQUIRES THE UNITED STATES TO PAY FILING FEE

Whether, in enacting the Adjudication Code Amendments in 1985 and 1986, the Executive

and Legislative branches of state government intended to purport to require the United States to pay filing fees in this adjudication.

(Issue No. 17, United States List of Issues at 9.)

The United States claims that a review of I.C. §§ 42-1414, 42-1409, and 42-1408(A)(1)(j) reflects an ambiguity in the legislation on the issue of whether or not the United States is required to pay filing fees. It argues that the court must, therefore, turn to extrinsic evidence on the issue of whether the legislature intended the United States to pay filing fees. The United States concludes that a review of the legislative history surrounding the adoption of the filing fees statutes shows that the Idaho Legislature did not intend to require filing fees from the United States.

The law governing statutory interpretation is well settled. In interpreting a statute, the court must first look to the four corners of the statute, giving plain meaning to the language used and determine whether an ambiguity exists. If none is found, the court is required to interpret the statute without resort to extrinsic evidence, including legislative history. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 151 (1965); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct. App. 1986).

I.C. § 42-1414 unequivocally provides that all notices of claims required to be filed in the adjudication must be accompanied by a filing fee. The filing fee requirement expressly and unambiguously applies to all notices of claim required by I.C. § 42-1409.

I.C. § 42-1409 sets forth two forms to be used in filing notices of claim. The first is for claims filed under state law; the second is to be used for the claim of a water right reserved under federal law. Reading

these two statutes, *in pari materia*, the legislature unambiguously required filing fees to accompany all claims in the adjudication whether predicated on federal or state law.

I.C. § 42-1408A(1)(j) reads:

> (j) section 42-1414, I.C. requires each claimant, other than those exempted by federal law, to pay a variable fee . . . .

This section of the adjudication statute, when read with I.C. §§ 42-1414 and 42-1409 does not constitute a blanket exemption from filing fees as argued by the United States. It is the clear statement by the legislature that where federal law exempts a claimant from the payment of filing fees no fee will be required. The statute is written in terms of "those exempted" by federal law, and does not name specifically or exclusively the United States. By using the general, all inclusive term in the statute, the Idaho Legislature meant to exempt any and all claimants exempted by federal law, which may include the United States. The United States reads the statute far too broadly when it claims that it is a clear and unequivocal blanket exemption from filing fees for the United States. The Idaho Legislature could have easily specifically exempted the United States from the filing fees requirement by so stating. By using this general language, the legislature has simply acknowledged that where federal law requires, the exemption must be honored. Therefore, the statutory scheme set up by the Idaho Legislature unambiguously requires all claimants to pay filing fees. A claimant who is entiled to an exemption under federal law must make its claim, in the first instance, to the Idaho Department of Water Resources. If the Department agrees, it

may accept the claim without a filing fee. If the Department disagrees, it will reject the claim unless the required filing fee is paid. In this instance, the claimant requesting exemption under federal law may bring its claim before the court. This is what the legislature intended to happen and is precisely what the United States has done.

Since the statute is not ambiguous, there exists no genuine issue of material fact. Based upon this court's interpretation of the statutory filing fee scheme in Idaho, the State of Idaho is granted summary judgment on this issue as a matter of law.

X.

IDAHO OPEN MEETING LAW

Whether the development of the fee schedule violated the Idaho Open Meeting Law, I.C. § 67-2340 through 2347, and if so, whether the fee schedule is void.

(Issue No. 18, United States List of Issues at 9.)

The record reflects that Idaho Governor John D. Evans, Idaho Attorney General Jim Jones, and Idaho Power Company Chief Executive Officer, James Bruce, established an *ad hoc* citizens advisory committee (the Committee) to analyze tand make recommendations on a proposed fee schedule for the Snake River Basin Adjudication. The Committee, made up of state officers and private citizens, reviewed the filing fee issue and recommended fee schedules to the three people who set up the Committee. These recommendations were later proposed to the Idaho State Legislature for inclusion in the Snake River Basin Adjudication statutes.

There is no factual dispute that the Committee did not meet in conformity with the Idaho Open Meetings Law. The United States contends that, since the Committee did not comply with the Open Meeting Law, the filing fee schedule, as adopted, is void.

The reading of the Idaho Open Meeting Law, advocated by the United States, constitutes interpretative prestidigitation in the extreme and is without legal support whatsoever.

I.C. § 67-2342 requires that:

> (1) All meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

The issue presented is whether the Committee is a "governing body of a public agency" under the law.

I.C. § 67-2341(3) defines "public agency" as:

> (a) any state board, commission, department, authority, educational institution or other state agency which is *created by or pursuant to statute*, ... (emphasis added.)

There is no genuine issue of material fact with respect to the creation of the Committee. No evidence exists indicating that the Committee was created by or pursuant to statute. Therefore, the claim of the United States utterly fails under the clear, explicit and unequivocal terms of the statute.

The absurdity of the United States' claim under the Open Meeting Law is underscored by its request that the matter proceed to trial because, "Discovery from

the Gardner Committee's members (the Committee) will likely reveal that they developed the 'fee' structure in closed meeting, perhaps under strict instructions from the parties to the 'Swan Falls dispute', recommended it to public agencies such as the Idaho Water Resources Board, and assisted in presenting it as a fait accompli to the Idaho Legislature." (U.S. Memo. in Opposition to Idaho's Motion for Partial Summary Judgment at 64.)

This claim belittles the legislative process surrounding adoption of the Snake River Basin Adjudication statutes and misreads the Idaho Open Meeting Act in a manner which offends the most basic notions of the constitutional separation of powers doctrine.

The record is eminently clear that the Committee was not a public agency under the terms of the Open Meeting Act and only served to place recommendations before the legislature. The legislature was under no obligation to accept these recommendations any more than it would be to accept proposed legislation from any source. The United States position is mistaken.

The United States further requests that this matter proceed to trial so that the court can review the legislative history surrounding the adoption of the filing fee statute to determine whether that statute was conscientiously considered by the legislature in compliance with the Opening Meeting Law. In support of this proposition, the government cites *State v. City of Hailey*, 102 Idaho 511, 633 P.2d 576 (1981), which deals with actions taken by the Hailey City Counsel, a body which falls within the purview of the Open Meeting Law. There is no question but that the Idaho State Legislature is similarly covered by the Open Meeting Law. However, there is nothing in the rec-

ord, other than bold assertions by the United States, that the legislature failed to meet its responsibilities under the statute and as further defined in *City of Hailey*.

The court unequivocally declines the invitation of the United States to ". . . determine conclusively what 'filing fee' question were 'conscientiously' presented to or considered by the Idaho legislature." (United States Memo. in Opposition at 65.) The United States wishes to have this court conduct a trial to determine how carefully the legislature considered various aspects of the filing fee issue. This request for second guessing the exercise of legislative discretion is wholly outside the bounds of the Idaho Open Meeting Law and is violative of rudimentary principles of the constitutional separation of powers doctrine.

The failure of the United States to present any facts that would support the conclusion it has chosen to draw about the adoption of the filing fee statute requires this court to enter summary judgment on behalf of the State of Idaho and against the United States. As with other issues this court has discussed relative to the State's motion for partial summary judgment, the United States cannot resist a motion for summary judgment by resting on its pleadings. This matter was filed over 18 months ago and the inability of the United States to present any objective evidence on this issue causes this court to conclude none exists. The government's inability to present such evidence is fatal to its position on the instant motion.

Therefore, there being no genuine issue of material fact with respect to the adoption of the filing fees statute by the Idaho State Legislature, summary judg-

ment is entered for the State of Idaho and against the United States as a matter of law.

DATED this 27 day of December, 1990.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

APPENDIX D

[R. 919-928]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

THE UNITED STATES; STATE OF IDAHO; and all claimants to the use of water from the Snake River Basin Water System, DEFENDANTS

MEMORANDUM DECISION

State of Idaho motion for Summary Judgment on Issues Numbered 1 and 2, UNITED STATES LIST OF ISSUES REGARDING IDAHO'S FILING FEES". *Granted.*

The State of Idaho seeks summary judgment on Issues Numbered 1 and 2 raised by the United States

in its list of issues relating to the requirement to pay filing fees in the Snake River Basin Adjudication. The United States alleges these issues as grounds supporting its Petition for Writ of Mandamus compelling the Director of the Idaho Department of Water Resources to accept all United States claims to water rights without the payment of filing fees set forth in I.C. § 42-1414.

The State's motion for partial summary judgment is reviewed under the well settled legal principles governing such motions. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any issues of material fact exist, all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, must be construed in the light most favorable to the non-moving party, I.R.C.P. 56(c); *Sewell v. Nielson, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct.App. 1985). When a motion for summary judgment is supported by facts of record, the opposing party must not rest upon bare allegations or denials in its pleadings. *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct.App. 1984).

I.

THE SUPREMACY AND PROPERTY CLAUSES

> Whether the imposition of Idaho's "filing fees", or any other monetary assessment upon the water rights of the United States, is barred by the Supremacy Clause, Art. VI or the Property Clause, Art. IV, § 3 of the United States Constitution.
>
> (Issue No. 1, United States List of Issues at 2-3.)

The requirement that the United States pay a filing fee as set forth in the Idaho adjudication statutes is not barred by the Supremacy or the Property Clauses of the United States Constitution. The *McCarran* Amendment, 43 U.S.C. § 666, is a clear and unambiguous broad waiver of sovereign immunity in a highly specialized case, the general adjudication of water rights in an entire stream system. This congressional waiver was intended to include the waiver of certain statutory and Constitutional immunities, including the Supremacy and Property Clauses of the United States Constitution.

Congressional waiver of federal rights which might operate to preclude the United States' participation in an adjudication and deference to the adjudication laws of an individual state is not a novel concept.

> . . . [T]he modern liberal view toward waivers of sovereign immunity by Congress, congressional policy of conformance with state laws concerning federal water rights, the inherent nature of water adjudication suits, the legislative history of Section 666 and its obvious purpose, the very terms of the section, and the limited jurisdiction of federal courts, combine to make manifest the clear intent of Congress that the waiver of immunity under Section 666 operates in suits brought in state courts. *In re Green River Drainage Area*, 147 Fed. Supp. 127, 134-135 (D. Utah 1956).

When Congress adopts broad statutory language consenting to suit, it must be treated as a deliberate act. The act of adoption of broad language "is not to be thwarted by unduly restrictive interpretations". *Canadian Aviator Ltd. v. The United States*, 324 U.S. 215, 222, 65 S.Ct. 639 (1945).

To resolve the issue presented by the United States, this court must interpret the *McCarran* Amendment. The rules governing statutory construction are well settled. The court must first look to the four corners of the statute and give plain meaning to the terms used. Effect must be given to every word, clause and sentence so as to implement every provision and not render any portion inoperative, superflous, void or insignificant. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct.App. 1986); *Ohio v. U.S. Dept of Energy*, 904 F.2d 1058 (6th Cir. 1990) *citing*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.20, 96 S.Ct. 1375, 1384, n.20 (1976); *Southerland Stat. Const.*, § 46.01, 46.04 (4th ed. 1984). Further, it is a well accepted rule of law that the language of a statute is ordinarily regarded as conclusive and a presumption exists that the words to a statute express the intent of the legislature. *See, e.g., North Dakota v. United States*, 460 U.S. 300, 103 S.Ct. 1095 (1983); *Moorhead v. The United States*, 774 F.2d 936 (9th Cir. (1985)); *Southerland Stat. Const.* § 46.04 (4th ed. 1984).

Reviewing a federal waiver of sovereign immunity, it has been held that:

> A waiver of sovereign immunity must be clear, express and unambiguous; it cannot be implied from vague language. (citations omitted.)
>
> In determining whether a waiver is clear, the controlling factor is the "underlying congressional policy." (Citation omitted.) We must avoid the temptation to seek any hint of ambiguity that can be used to twist the statute into denying sovereign immunity. (citation omitted.) When Congress enacts a clear waiver, that waiver should not be 'thwarted by an unduly restrictive interpretation' in the courts. (citation omitted.)

Ohio v. The United States Department of Energy, 904 F.2d 1058, 1059-60 (6th Cir. 1990).

The language of *McCarran* has been broadly applied by the United States Supreme Court, as intended by Congress. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 827 (1983), the issue was whether the *McCarran* Amendment included consent to the determination of federal reserved rights held on behalf of Indian tribes. The court ruled:

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions (citation omitted) . . . The Amendment deals with an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' . . . (citation omitted.)
>
> In sum, considering the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding . . . excluding [Indian water] rights from its coverage would enervate the Amendment's objective . . . (citations omitted.)
>
> [T]he clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is the avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdepend-

> ent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. *The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for the adjudication of water rights as the means for achieving these goals.*

San Carlos, at 551-552. (emphasis added.)

As a guide to reviewing congressional intent to waive immunity, the Supreme Court has commented that:

> In determining whether there is a waiver of sovereign immunity, that determination "is accomplished not by a 'ritualistic formula'; rather, intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." (citation omitted).

Franchise Tax Board of California v. The United States Postal Service, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554 (1984).

The ordinary, contemporary and common meaning of the language of *McCarran* is that Congress waived *all rights* to assert any facet of sovereign immunity in a general adjudication of all water rights in an entire stream system which is being conducted in accordance with state law. This includes protections otherwise afforded under the Supremacy or Property clauses of the United States Constitution.

Congress recognized that a general stream adjudication is a very large and specialized case. The policy and purpose of McCarran would, therefore, be defeated if the United States' water rights were not

included in such an adjudication. There is no doubt that congress intended the United States' water rights be adjudicated in qualified cases and Congress adopted the *McCarran* Amendment in furtherance of that goal. In so doing, Congress recognized and acknowledged the benefit to the sovereign if its water rights were adjudicated and administered in one process in the State courts.

The plain language of McCarran could not be clearer. The United States specifically consented to be joined as a party in the adjudication and administration of the Snake River Basin System. The United States specifically consented to the waiver of any right to argue that Idaho's laws are not applicable to the United States; and, further, the United States waived the right to argue that the United States was not amenable to Idaho's laws by reason of any aspect of "sovereignty". Since Congress determines the scope of the waiver of sovereign immunity, this court must give full effect to that waiver. *United States of America v. South Coast Air Quality Management District, et al.*, 748 F. Supp. 732 (D.C.C.D. Ca. 1990).

Therefore, the waiver of sovereign immunity embodied in the *McCarran* Amendment constitutes a waiver of protection under the Supremacy and Property Clauses of the United States Constitution. There being no genuine issue of material fact on this issue, the State of Idaho is granted summary judgment as a matter of law.

II.

THE DOCTRINE OF SOVERIGN IMMUNITY

> Whether the United States is immune by virtue of the doctrine of sovereign immunity from the imposition of filing fees in this law suit.
>
> (Issue No. 2, United States List of Issues at 3).

The resolution of this issue rests on the same principles governing summary judgment and statutory interpretation as set forth in Section I, above.

The *McCarran* Amendment waiver of sovereign immunity was intended as a waiver of any federal claim to exemption under the general doctrine of sovereign immunity. This is also true on the issue of the filing fee requirement contained in the Idaho statute. Congress' understanding of the specialized nature of general adjudications of entire stream systems necessarily included in understanding of the costs which might be involved in such cases. *McCarran* specifically exempts the United States from paying any "judgment for costs". No exception for filing fees was mentioned. Given Congress' intent to allow general stream adjudications to proceed in state court for the good of all water claimants, including the United States, it is unreasonable to read into *McCarran* any exemptions other than that explicitly stated. If Congress had intended to exempt the United States from paying filing fees, it was well able and empowered to so state. It did not. This court cannot, therefore, create such an exception where Congress declined to. By specifically enumerating one exception in *McCarran*, congressional silence on other exceptions takes on meaning. This court interprets Congress' silence as a purposeful decision not to establish any further exceptions.

The United States is essentially asking this court to rewrite 43 U.S.C. § 666 and specifically include an additional exemption for the United States that the United States does not have to pay filing fees required by state law. The United States has been paying filing fees "under protest" in various state adjudications for years. Should Congress, in the future, desire to exempt the United States from paying filing fees in order to accomplish participation in the administration and adjudication of its water rights, Congress can amend *McCarran* to make clear its intention to exempt the United States from payment of filing fees. There being no genuine issue of material fact or this United States' claim, the State of Idaho is granted summary judgment as a matter of law.

III.

ISSUES TO BE RESOLVED BY TRIAL

Notwithstanding the United States position that whether the statutorily imposed filing fees amount to a "fee" or a "tax" is irrelevant, it is found that the United States bears the burden of proof to establish that it is exempt from the payment of filing fees because they constitute an illegal or "disguised tax" upon the United States.

The United States further bears the burden of proof to establish that the *McCarran* exception from paying a judgment for costs includes an exemption from paying filing fees required by the statute.

This Memorandum Decision constitutes this court's findings of fact and conclusions of law herein. Counsel for the State of Idaho is to prepare proposed order, submitting copies to the court and counsel for review and entry.

IT IS SO ORDERED.

DATED this 24th day of January, 1991.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

APPENDIX E

[R. 1031-1059]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

THE UNITED STATES; STATE OF IDAHO; and all unknown Claimants to the use of water from the Snake River Basin Water System, DEFENDANTS

MEMORANDUM DECISION

United States Petition for Writ of Mandamus compelling the Director of the Idaho Department of Water Resources to accept the filing of U.S. water rights claims without the payment of statutory filing fees. *Denied.*

This matter is before the court following a trial on the United States' Petition for a Writ of Mandamus (Mandamus) ordering the Director of the Idaho Department of Water Resources to accept the filing of United States water rights claims in the Snake River Basin Adjudication without the payment of filing fees as required by I.C. § 42-1414.

This matter has procedurally progressed as follows: The United States filed a Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief on June 30, 1989. The United States filed a "List of Issues regarding Idaho's 'Filing Fees'" which identified 20 issues which the United States believed were issues to be litigated. On December 27, 1990, this court entered partial summary judgment as to issues numbered 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18. On January 24, 1991, this court entered partial summary judgment as to issues numbered 1 and 2. Left for resolution are issues 3, 4, 5, 6, 15, 16, 19 and 20.

I. NATURE OF ACTION AND BURDEN OF PROOF

The United States has the affirmative burden of proof of establishing the following five (5) elements in order for mandamus to issue: 1) A clear and complete right to have the act performed; 2) A clear legal duty on the part of the respondent to perform said act; 3) That it is within the power of the respondent to perform the act; 4) That the respondent has failed or refused to perform act and; 5) That there is no adequate remedy at law. *See, e.g., Lewis v. Mountain Home Co-Op Irrigation Co.*, 28 Idaho 682, 691, 156 P. 419 (1916).

Where a Writ of Mandamus is requested, the burden of proof is governed "by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence." *Ferris*, Extraordinary Legal Remedies, § 253 (1926) (Ferris).

While the United States has at times invoked equity in its claim for mandamus, it must be noted that mandamus is "an extraordinary legal remedy with which equity has nothing to do, and in consideration of which no equitable rights or principles can be taken into consideration except solely for the purposes of determining whether, in the exercise of legal discretion, the Writ should issue." Ferris, § 190. A party moving for mandamus must,

> . . . Show an unqualified right to the Writ . . . (I)n its final analysis the question for determination is whether the right of the aggrieved party is so free from doubt, and the duty of the officer is so clear from any substantial question, that an order should issue to compel performance. The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties. If the right be doubtful, it must first be established in some other form of action; mandamus will not lie to establish, as well as enforce a claim of uncertain merit. *Ferris*, § 194.

Idaho courts frame the issues in a mandamus proceeding on the basis of whether there is a *clear legal right to* have the act performed as requested by the petition and whether there is a *clear legal ministerial duty* on the part of the official to perform that duty. *See, e.g., Felton v. Prather*, 95 Idaho 280, 506 P.2d 1353 (1973).

The court must consider the facts as they presently exist and in "a mandamus proceeding against a public officer involving the performance of official duties, the inquiry is generally limited to the question of the officer's duty on the face of the statute and the ministerial character of the duty he is charged to perform." *Mandamus*, 55 C.J.S., § 334.

The threshold issue is whether there exists a plainly defined and preemptory duty on the part of the Director to accept the United States' filing of water rights claims for processing in the Snake River Basin Adjudication without the payment of statutory filing fees. This requires the interpretation of the Adjudication Statutes to determine the nature and extent of the Directors' duties with respect to the acceptance of claims and collection of filing fees.

II. CLEAR LEGAL DUTY

The United States contends that I.C. § 42-1414 and I.C. § 42-1408A(1)(j) establish a clear legal duty requiring the Director to accept federal claims without the payment of filing fees. Paraphrased, I.C. § 42-1414 requires the United States to pay the statutorily defined filing fees at the time that it files federal water right claims unless, in accordance with I.C. 1408A-(1)(j), the United States is exempted by operation of federal law.

The United States has claimed federal and State of Idaho legal bases which qualify it for exemption under I.C. § 42-1408-(1)(j): 1) that the language of the *McCarran* Amendment, 43 U.S.C. § 666, is so broad that its exemption from payment of a "judgment for costs" includes the payment of filing fees, and 2) that the statutory filing fees are an illegal or disguised tax from which the United States is

exempted under Article VI of the United States Constitution and Article 7, § 4 and Article 21, § 19 of the Idaho Constitution.

A. "Judgment For Costs" Exemption.

The *McCarran* Amendment provides, in relevant portion, that:

> Consent is hereby given to join the United States as a defendant in any suit 1) for the adjudication of the rights to the use of water of a river system or other source . . . Provided that no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666.

The determination of the United States' claim that the *McCarran* Amendment's exemption from a "judgment for costs" prohibits the Director from collecting a filing fee is a matter of statutory interpretation invoking the long standing rules surrounding this judicial task.

The court must first look to the four corners of the statute and give plain, ordinary and common meaning to the terms contained therein. Effect must be given to every word, clause and sentence so as to implement every provision of the statute and not render any portion inoperative, superfluous, void or insignificant. The language of the statute is ordinarily regarded as conclusive and a presumption exists that the plain words of a statute express the intent of the legislature. *Southerland Stat. Const.*, § 46.01, 46.04 (4th Ed. 1984); *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct.App. 1986); *Ohio v. United States Department of Energy*, 904 F.2d 1058

(6th Cir. 1990); *North Dakota v. United States*, 460 U.S. 300, 103 S.Ct. 1095 (1983). This framework is well settled in Idaho jurisprudence.

> When interpreting the meaning of the language contained in a statute, this Court's task is to give effect to the legislature's intent and purpose. (Citation omitted.) In construing a statute, the Supreme Court may examine the language used, reasonableness of the proposed interpretations, and the policy behind the statutes. (Citation omitted.) It is incumbent upon this Court to interpret a statute in a manner that will not nullify it, and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute. (Citation omitted.) The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein. (Citation omitted.) 'It is the duty of the courts in construing statutes to harmonize and reconcile laws whenever possible and to adopt that construction of statutory provision which harmonizes and reconciles it with other statutory provisions'. (Citation omitted.) 'Any ambiguity in a statute should be resolved in favor of a reasonable operation of the law'. (Citation omitted.) When construing the language contained in a statute, this Court will construe statutory terms according to their plain, obvious, and rational meanings. (Citations omitted.) *Sweitzer v. Dean*, 118 Idaho 568, 798 P.2d 27, 30-32 (1990).

The first inquiry is whether 43 U.S.C. § 666 is ambiguous. As in every case involving the interpretation of a statute, analysis must begin with the language employed by Congress. *Rubin v. United States*,

449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). The Idaho Supreme Court has stated that, "Under these circumstances it is of importance to determine what is meant by 'ambiguity'. The term has been defined as doubtfulness, doubleness of meaning or indistinctness or uncertainty of meaning of an expression used in a written instrument." (citations omitted). *Roe v. Hopper*, 90 Idaho 22, 26-27, 408 P.2d 161 (1965).

Applying this standard to *McCarran's* use of the term "judgment for costs", this court holds that 43 U.S.C. § 666 is not patently ambiguous. Nothing on the face of the statute raises an issue of uncertainty of meaning, doubtfulness, or indistinctness or doubtfulness of meaning.

The next inquiry is whether the legal term of art "judgment for costs" contained in 43 U.S.C. § 666 manifests a latent ambiguity.

When the terms of a statute are unambiguous, judicial inquiry comes to an end, except in rare and exceptional circumstances when it is necessary to override the literal terms of a statute in order to avoid an absurd result. *See, e.g., Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930).

> It has been held that even if the words of the statute are plain and unambiguous on their face the court may still look to the legislative history in construing the statute if the plain meaning of the words of the statute is at variance with the policy of the statute or if there is a clearly expressed legislative intention contrary to the language of the statute.

Southerland Stat. Const., § 46.01; 47.29 (4th Ed. 1984.)

At trial, judicial notice was taken of the adjudication statutes which existed at the time the *McCarran* Amendment was being considered by Congress in what have been referred to as the seventeen "western states". Those adjudication statutes allowed the costs of the adjudication of water rights between private parties to be assessed against the parties at the conclusion of the litigation.

Notwithstanding these statutory provisions, this court does not find the existence of a latent ambiguity in the *McCarran* Amendment's use of the term "judgment for costs" which is a specific, well-defined and commonly understood legal term of art. Therefore, resort to extrinsic evidence, including legislative history would be improper. There exists no clearly expressed legislative intent which is contrary to the language of 43 U.S.C. § 666 in its ordinary sense as a legal term of art.

In the absence of legislative intent to the contrary or other overriding evidence of a different meaning, technical terms or terms that are used in a statute are presumed to have their common technical meaning. *Southerland Stat. Const.*, § 47.29 (4th Ed. 1984).

In parsing the term "judgment for costs", "costs" have been defined as:

> . . . (S)tatutory allowances to a party to an action for his expenses incurred in the action. They are in the nature of incidental damages allowed to the successful party to indemnify him against the expenses of asserting his rights in court, when the necessity for so doing was caused by the others breach of a legal duty . . . A party claiming a judgment for costs against an adversary must bring himself within the operation of some statutory provision.

Costs, 20 Am. Jur.2d § 1; § 5.

Generally, the "costs of an action are ordinarily included in the final judgment and are collected with that judgment at the same time and in the same manner; that is by the issuance of an execution against the property of the debtor." *Costs*, 20 Am. Jur.2d § 95.

The term "judgment" has been defined as follows:

> A judgment is the law's last word in a judicial controversy. It is the result of the application of legal principles to the state of facts presented to the court. It may be defined as the court's official and final consideration and determination of the respective rights and obligations of the parties . . . *Judgment*, 46 Am. Jur.2d § 1.

The common technical meaning of the term "judgment for costs" is best reflected in the language in Rule 54 of the Federal and Idaho Rules of Civil Procedure.[1]

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[1] IRCP 54(a). Judgments-Definition-Form.—"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

IRCP 54(d)(5). Memorandum of costs.—At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment. Such memorandum must state that to the best of his knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs. A memorandum of costs prematurely filed shall be considered as timely.

In support of its claim to exemption, the United States points to several expenditures already made in the Snake River Adjudication which it contends fall within the definition of "judgment for costs" and are includible as costs under I.R.C.P. 54. These are:

1) Attorney fees and related deposition costs, I.R.C.P. 54(d)(1)(9)(10);
2. Service of Process, I.R.C.P. 54(d)(1)(C)(2);
3. Judicial expenses, I.R.C.P. 54(d)(1)(E); and
4. Expert and lay witnesses and investigation and studies/exhibits, I.R.C.P. 54(d)(1)(C)(3)(6) and (8).

The United States has previously acknowledged the propriety of using filing fees to defray the costs of the administration of the adjudication process incurred by the judiciary. (Transcript, Hearing on

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FRCP 54. Judgments; Costs

(a) Definition; form

"Judgment as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(d) Costs

Except when express provision therefor is made either in a statu[t]e of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Motion for Partial Summary Judgment, October 16, 1990, p.p. 52-54).

The same United States' claim to exemption from filing fees was decided by the Colorado Supreme Court in the case of *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983). The court ruled against the United States, affirming decisions of the trial court and the Master-Referee who held:

> The *McCarran* Amendment's prohibition against judgments for costs clearly precludes an award of such judgments to parties opposing the United States. The prohibition does not, however, excuse the United States from paying a filing fee. The imposition of a filing fee on the United States is not a judgment for costs. While filing fees of opposing parties might otherwise be included in their judgment for costs against the United States, such judgments are prevented by the *McCarran* Amendment. In other words, the *McCarran* Amendment merely prevents the United States from being forced to pay the filing fees of its opponents. It does not excuse the United States from paying its own.

Partial Report of the Master-Referee report covering all of the claims of the United States of America filed in *In the Matter of the Application for Water Rights of the United States of America*, Colo. Dist. Ct. Water Div. no. 4, W-425 through W-438; Colo. Dist. Ct., Water Div. no. 6, W-85 through W-86; State of Idaho Exhibit 192.

In its affirmance, the Colorado Supreme Court stated that:

> Payments were made under protest on the theory that the United States had not consented to liability for such fees. The water court held, however, that the United States, by consenting to suit through the *McCarran* Amendment, became subject like other parties to the obligation to pay filing fees."

City and County of Denver, at 15. Ultimately, the United States agreed to pay the filing fees required by Colorado law. *Id.*, at 20-21, FN #33.

This court agrees with the interpretation adopted and reasoning expressed in *United States v. City and County of Denver, Id.* Nothing has been presented at trial which avoids the logic of the Colorado decision. The *McCarran* Amendment is a clear and concise statement by Congress that it has waived sovereign immunity and consented to be made a party in State court in general adjudications of entire stream systems. The exemption from payment of a "judgment for costs" is equally clear and does not exempt the United States from paying filing fees.

Interpreting "judgment for costs" as a legal term of art disallows the interpretation advanced by the United States. To adopt an interpretation contrary to the common technical meaning ascribed to "judgment for costs" would violate the plain meaning of Congress' wording as expressed in *McCarran*. The United States has repeatedly argued that it is exempt from paying filing fees in adjudications throughout the west. Nine years has passed since the Colorado Supreme Court ruled against the United States on this issue and Congress has yet to express a different intent. If Congress intended a broader exemption, it would, could, and still can, amend the *McCarran* Amendment and exempt the United States from paying filing fees.

It is, therefore, held that the *McCarran* Amendment, 43 U.S.C. § 666, does not exempt the United States from paying the filing fees required by I.C. § 42-1414 in the Snake River Basin Adjudication.

B. "Disguised Tax" Exemption

This court has previously held that the filing fees contemplated by I.C. § 42-1414 do not constitute a "tax" upon the United States. *See* Memorandum Decisions dated December 28, 1990; January 24, 1991.

Not every economic exaction directed against the federal government rises to the level of a "tax" simply because the exaction itself exists. In this action, the United States has the burden of establishing that this constitutionally permissible fee statute is a "disguised tax" based on the manner in which the filing fees are being expended.

The United States claims the filing fees deposited into the adjudication account, account 9337, are not being spent for purposes reasonably related to the administration and adjudication of water rights in the Snake River Basin and, as such, the filing fees have become a disguised tax against the federal government.

The facts in this case are unlike those in *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978) and, therefore, the *Massachusetts* three-pronged test is not controlling. At issue here is whether the money received from this constitutionally permissible fee statute is being applied or expended in such a fashion as to render the fee a "disguised" tax.

At trial, the United States sought an evidentiary hearing based on the three-pronged test set out in *Massachusetts, supra*. In granting Idaho Power Company's motion *in limine*, the United States was precluded from collaterally attacking this court's prior holdings as they relate to whether, on its face, the fee statute is a "tax" *per se*.

This denial of the United States' request to conduct an evidentiary proceeding employing the *Massachusetts* test is supported by the *United States v. City of Columbia, Missouri*, 709 F.Supp. 174 (W.D. Mo. 1989). There, the District Court reasoned that the court in *Massachusetts, supra*, assumed, without discussing, that the fee exaction at issue *was a tax*. *City of Columbia*, at 178. The assumption which controlled the *Massachusetts* court's reasoning is directly opposite the holding by this court in the Snake River Basin Adjudication that the filing fee is *not* a tax *per se*.

The trial court in *City of Columbia* concluded that the appropriate test is that set forth in *United States v. Maryland*, 471 F.Supp. 1030 (D.Md. 1979) stating that:

> . . . [T]he Supreme Court in *Massachusetts* borrowed a test it first used in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, (citation omitted.) The issue presented in *Evansville* was whether a charge by a state or municipality of $1 per commercial airline passenger to help defray the costs of airport construction and maintenance was an unreasonable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution . . .
>
> [T]he test used in *Massachusetts* and *Evansville* was intended to prevent essential state functions and interstate commerce from being burdened by excessive taxation. The *Massachusetts*

test provides a standard to determine at what point the amount of tax becomes too burdensome to pass Constitutional muster.

Both the Maine (*United States v. Maine*, 524 F. Supp. 1056 (D.Me. 1981)) court and the United States in the instant matter have misapplied the *Massachusetts* test. In their attempts to determine whether a certain charge is a tax, they have improperly seized on a test designed to set the parameters for determining whether the amount of a tax is constitutionally permissible . . .

[T]he correct approach for determining whether a charge is a tax is found in *United States v. Maryland*, 471 F. Supp. 1030, 1036 (D.Md. 1979). In determining whether an environmental surcharge imposed on private utility companies by the state to fund an Environmental Trust Fund was a tax, the court relied both on the Supreme Court's definition of a tax in the *United States v. LaFranca*, 282 U.S. 568, 51 S.Ct. 278, 75 L.Ed.551 (1931) and on an illuminating discussion about the nature of a tax in *National Cable Television Association v. United States*, 415 U.S. 336, 340-41, 94 S.Ct. 1146, 1148-49, 39 L.Ed.2d 370 (1974). A tax is an 'enforced contribution to provide for the support of [the] government'. (citation omitted.) Distinguishing between a tax and a fee, the Supreme Court has stated that, 'a public agency performing . . . services may exact a fee for a grant which, presumably, bestows a benefit upon the applicant, not shared by other members of society'. (citation omitted.) Stated another way,

> a tax is money taken by a government to be used for public purposes. (citation omitted.)

City of Columbia, at 178-179.

On appeal, the court in *United States v. City of Columbia, Missouri*, 914 F.2d 151 (8th Cir. 1990) reversed, and held, that while the trial court had correctly applied *LaFranca* and *National Cable*, it had relied too heavily on the fact that the utility payments were deposited into the city's general revenue fund which benefited the general public and not just the utility company customers. The Court of Appeals stated:

> We do not believe that our holdings that the PILOT is not a tax is contrary to the supreme Court's statement in *LaFranca* that '(a) tax is an enforced contribution to provide for the support of the government . . .' (citation omitted.) The United States, as well as the district court, relied on this language as though it provided a litmus test for determining whether or not a charge is a tax. *We do not think the court in LaFranca intended by the above-quoted language to establish broadly that in all instances where money is exacted for support of government the payment constitutes a tax.* The court in *LaFranca* did not state that its description of a tax to serve as a singular approach to ascertaining whether something is a tax. Rather, the court used that language as a broad description of the nature of a tax . . . 914 F.2d 151 at 156. (emphasis added.)

This court's denial of the United States' request to proceed under the three-pronged *Massachusetts* test is further supported by Congressional consent to be

made a party and be subject to the laws and courts of the state of Idaho in a general stream adjudication. (43 U.S.C. § 666.)

In *United States v. South Coast Air Quality Management District*, 748 F. Supp. 732 (D.C.C.D. Cal. 1990), the *South Coast* court aptly described the *Massachusetts* test as applying when "determining whether a fee could ever be imposed on one sovereign by another sovereign absent a waiver of sovereign immunity. Thus, *this three part analysis has no application when one sovereign consents to the application of a fee by another sovereign.*" *South Coast*, *Id.*, at 741. (emphasis added.)

The court elaborated further:

> If the government can show that the tax would be illegal as applied to a private party, then such tax or fee would be illegal as applied to the United States . . . .
>
> It must be presumed that Congress considered the risks involved with the United States pressing claims in state courts when it waived sovereign immunity.

South Coast, *Id.*, at 740.

Applying the tests enunciated in the *LaFranca*, *supra*, and *National Cable*, *supra*, this court heard evidence on expenditures made from the 9337 account to determine whether the filing fee money is being used for public purposes. At trial, the United States put on evidence on expenditures from the adjudication account, the 9337 account, which it believes are improper: 1) salaries, benefits and travel expenses of attorneys and other staff employed by the Idaho Department of Water Resources; 2) expenditures related to utilizing the negotiation process to

resolve water claims; 3) contracts for water monitoring programs, ground water models and service of process; and 4) one erroneous expenditure for an Idaho Water Resource Board member charged to the 9337 account.

1. Idaho Department of Water Resources Staff

The United States contends that the Director of the Department of Water Resources should not be able to fund legal counsel or other staff assisting him in complying with, performing and implementing his duties under the adjudication statutes from the filing fee account. This court disagrees.

The main thrust of the United States' argument is that counsel and staff to the Director serve in a capacity which is adversarial to theirs. However, in using the term "adversarial", care must be taken in its application to the adjudication process. When the Director is performing a duty which is part of the administration of the adjudication as set out in the statutes, he is entitled to have staff support to assist in the performance of those duties. Where the Director or his staff perform acts which are reasonably and rationally related to his statutory duties, costs associated with the performance of those duties may be born by the adjudication account. In so far as the activities of the Director and any expenditures made on behalf of those activities are reasonably and rationally related to his duties under the adjudication statutes, he is neither a adversary nor an adversarial party. In performing his duties leading to the issuance and filing of the Director's reports, he acts in a quasi-judicial capacity. When the Director proceeds outside his quasi-judicial statutory capacity, and becomes a party opponent in this litigation matter, costs

associated with such efforts become a general revenue obligation of the state.

Here, the adjudication statute requires the Director to collect a filing fee from all claimants who are not otherwise exempted by the adjudication statute or federal law. Expenses incurred by the Director in opposing the United States' Petition for a Writ of Mandate are properly related to the Director's statutory function as set forth in I.C. § 42-1414. It is, therefore, concluded that money expended from the adjudication account, the 9337 account, for the benefit of the Director's defense in this filing fee dispute, including staff and attorneys, are reasonably and rationally related to his duties under the adjudication statutes. These expenses are deemed proper and do not convert the filing fees into a disguised tax upon the United States.

2. Negotiations to Resolve Water Claims

The United States also challenges the salary and related expenses of David Shaw, Idaho Department of Water Resources, Adjudication Bureau Chief, for time spent in negotiations leading to the resolution of water claims, specifically those of the Shoshone-Bannock Tribes. The United States contends such expenditures are not authorized by the adjudication statutes. This court disagrees.

The adjudication statute provides that negotiated settlements may be included in the Director's report. (I.C. § 42-1411). The statute, therefore, contemplates the conduct of negotiations on water claims and settlement of those claims which then can be included in the Director's report. However, any negotiations conducted after the filing of the Director's report fall within the context of litigation and cannot be charged against the adjudication account. The

Director's quasi-judicial function of working toward negotiated settlements prior to the filing of the Director's report is an important part of his duties.

The expenditures from the adjudication account related to negotiations, including those of David Shaw and attorneys, are reasonably and rationally related to the duties of the Director in the administration of the adjudication. They are expenses properly paid from the adjudication account and do not convert the filing fees into a form of disguised tax against the United States.

3. U.S.G.S. Contracts

The United States further challenges expenditures from the adjudication account for two United States Geological Service (U.S.G.S.) contracts arguing that it is improper to pay for a water monitoring program and a ground water model out of the 9337 account where the programs will be used for more than the Snake River Basin Adjudication and in Idaho Department of Water Resources departments other than the Adjudication Division. The United States also objects to these expenditures because the programs predate the adjudication commencement order. The federal government claims that these studies are of no assistance to the Director in issuing the Director's Report because of the limited information they contain which is related to the nature and extent of water rights claims. Finally, the United States believes that these studies should not be paid out of the adjudication account because they are related to the administraiton of water rights as distinguished from the determination or quantification of water rights. This court disagrees.

There was a great deal of testimony presented at trial about the unique nature of the Snake River

aquifer and the interdependence of surface and ground water throughout Southern Idaho. The evidence reflects that the U.S.G.S. studies will assist the Director in the preparation of the Director's Report. Significantly, no testimony or evidence was introduced rebutting Dr. Brockway's characterization of these studies as "essential" to the adjudication process.

The administration and management of water rights is an integral component of the adjudication process, factually and statutorily (I.C. § 42-1406A, 42-1412(8), 42-1417(3); 43 U.S.C. § 666). The fact that these studies were begun prior to entry of the commencement order, that they will be useful in departments other than the adjudicaiton division and that the majority of funding for the studies was shifted to the state's general account in fiscal 1991, avoids the central inquiry in deciding their propriety as an expense of the adjudication. The proper inquiry is whether the expenditure is reasonably and rationally related to the adjudication process and the Director's duties under the adjudication statutes.

It is found that the U.S.G.S. contracts, as well as the contracts related to service of process and notice conducted by the Director pursuant to statute, are necessary and are reasonably related to the Director's statutory duties in the Snake River Basin Adjudication. The expenditures may appropriately be charged to the adjudication account and do not constitute a disguised tax against the United States.

4. Expenditure For Water Board Member

The United States, after reviewing thousands of vouchers and several annual audits covering all Department of Water Resource expenditures from the

adjudication account, discovered one plane ticket which was erroneously charged to that account. The plane ticket was for Mr. Gray, a Director of the Idaho Water Resource Board. David Shaw admitted, under examination, that account 9337 was improperly charged for this plane ticket and that he would immediately see that the error was corrected.

David Shaw testified at length about the Department's review process for all expenditures out of the 9337 account. There is presently in place a defined duty and mechanism to correct accounting errors of this type. He testified that the review process had uncovered errors in the past which were corrected.

There have been tens of thousands of expenditures and this one expenditure slipped through the review process. The careful scrutiny of the 9337 account by the United States, with the finding that there was but one error, speaks well of the account review process presently in place. A simple bookkeeping error does not render the filing fees a "tax".

III. CONCLUSION

Congress consented to appear in a state court general stream adjudication and to the conclusive effect of the laws of Idaho in the adjudication of United States' water rights. The exaction of a filing fee for achieving Congressional intent as expressed in the *McCarran* Amendment, does not interfere with the performance of any federal function or duty. The filing fee is a reasonable charge assessable upon an "identifiable receipt for a measurable unit or amount of government service or property from which he derives special benefit." *Federal Power Commission v. New England Power Company*, 415 U.S. 345, 349, 94 S.Ct. 1151, 1154 (1974). The ultimate beneficiary,

the United States, is well served by having its water rights administered and adjudicated. This benefit is not obscure and the service which the United States receives, the quantification and prioritization of its water rights, cannot be "primarily considered as benefiting broadly the general public." *Id.*; *See also, National Cable Television Association v. United States*, 415 U.S. 336, 94 S.Ct. 146 (1974).

This court's research has not disclosed any Idaho authority directly on point. Instructive are those cases which analyze a municipality's police power and which give guidance on when a "fee" is transformed into a "tax" by the manner in which the money is being expended.

In *Kootenai County Property Association v. Kootenai County*, 115 Idaho 676, 769 P.2d 553 (Idaho 1989), the Idaho Supreme Court found that the county's imposition of an annual solid waste disposal fee was reasonable even though owners could not opt out of the plan and that the fee was not a tax within the meaning of Idaho's Constitution. The Court found that charging a flat residential sewage fee was reasonable even though the actual use (outflow volume) varied somewhat from house to house.

The property association argued that "when the benefit derived is a benefit to the general public, fees to provide the benefit must be considered a tax. A fee, according to the association, is voluntarily paid for specific services while a tax is involuntarily obtained for the general public benefit. *Kootenai County*, at 679.

Here, the Snake River Basin Adjudication filing fees are not charged to every person or citizen of the State of Idaho. The filing fees are charged only if one has a water right for which a claim is filed, adjudicated and administered. The filing fees do not fund a general public benefit or service. This court's holding that the filing fee is a valid exaction and not a disguised tax is consistent with Idaho precedent.

The United States failed to meet its burden of proof to establish that, 1) the United States has a clear and complete right, under federal law, to have the Director accept the United States' water claims without payment of filing fees; 2) that the Director has a clear legal duty, a plainly defined and peremptory duty, to accept the United States' water claims without payment of filing fees, and 3) that it is within the power of the Director to accept the United States' water claims without payment of filing fees.

Having failed to meet the elements necessary for the issuance of a Writ of Mandamus, the United States' Petition for a Writ of Mandamus is denied.

The United States and the State of Idaho in post-trial briefing have advised the court that Issues 5, 6, 15, 19 and 20 as identified by the "United States' List of Issues regarding 'filing fees'" are "either subsumed in prior rulings or have been withdrawn by the parties." (Memorandum in Support of the United States' Motion for Judgment After Trial, February 25, 1991, p. 4, footnote 2; Memorandum in Opposition to United States' Motions, March 8, 1991, p. 2).

The United States contends that Issue 16 is unresolved:

> Whether Idaho's projection of filing fees revenues and adjudication expenses have been or are reasonable or rational. If there is a surplus in the water resources adjudication account at the conclusion of the Snake River Basin Adjudication, are the water right claimants entitled to a

pro-rata refund of unspent proceeds in the account? What remedies exist for claimants to ensure that the moneys in the fee account are not wasted or diverted for purposes other than the adjudication of water rights?

The United States, in its post-trial briefing attempts to move this court for an order for an "accounting" pursuant to I.R.C.P. 53(d)(3). The United States asks this court to construe Issue 16 as the basis for such a motion.

The controlling pleading before the court, is the Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief, filed June 30, 1989. The Petition does not ask the court for an order compelling an accounting pursuant to I.R.C.P. 53(a)(3). The legal issue of whether an accounting should be ordered was not expressly or impliedly tried to the court.

The court finds that the question framed by Issue 16—"If there is a surplus . . . *at the conclusion* of the adjudication, *what remedies exist* . . . to ensure moneys . . . are not wasted or diverted . . ." is speculative and premature. The court cannot and will not give advisory opinions nor can the court decide a matter absent a case or controversy. However, one portion of Issue 16 has been disposed by the court's ruling on the Petition for Mandamus. The court implicitly finds that Idaho's projections of filing fees revenues and adjudication expenses have been or are reasonable or rational because the challenged expenditures from the 9337 have been or are reasonably and rationally related to the adjudication.

Notwithstanding the United States' position that Issue 5 has been subsumed by this court's prior holding on Issue 1, Issue 5 is fully resolved by this Memorandum Decision.

This Memorandum Decision, therefore, disposes of the following remaining issues, identified by the United States' List of Issues regarding Idaho's "filing fees":

Issue 3: Whether Idaho's "filing fees"—amount to a) judgment for costs; b) a security for damage or costs; c) are in violation of the doctrine of sovereign immunity, and d) are in violation of the "American Rule."

Issue 4: Whether Idaho's "filing fees" operate as a disguised tax on the federal government, its water rights, or both in violation of the Constitutions and laws of the United States and the State of Idaho.

Issue 5: Whether the payment of filing fees interferes with the federal government's management of property.

Issue 16: Whether the projections of filing fees, revenues and adjudication expenses have been or are reasonable and rational.

This court finds that Issue 6, whether Idaho may prohibit diversion and use of water for failure to comply with the schedule for payment of filing fees, is not ripe for review in this proceeding.

This memorandum decision constitutes the court's findings of fact and conclusions of law herein. Counsel for the State of Idaho is to prepare a proposed order reflecting this decision, submitting copies to the court and counsel for review and entry.

IT IS SO ORDERED.

DATED this 11th day of April, 1991.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

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